ORIGINAL 91-7094

Supreme Court, U.S.
FILED
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No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections; and
ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Willie Lee Richmond, through his undersigned counsel, hereby moves this Court for leave to proceed on his Petition for Certiorari in forma pauperis, without prepayment of costs and fees. Petitioner has been indigent and proceeded in forma pauperis at all stages of the state and federal proceedings in this case. Counsel was appointed to represent him in both courts below under the Criminal Justice Act, and 21 U.S.C. § 848(9).

DATED this 15 day of January, 1992.

Respectfully submitted,

Timothy K. Ford
Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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91-7094

QUESTIONS PRESENTED

1. Whether petitioner's death sentence contravenes the Eighth and Fourteenth Amendments because it was upheld by the Arizona Supreme Court on the basis of an application of Arizona's "especially heinous, atrocious or cruel" aggravating circumstance which either extends the circumstance to a set of facts that no rational factfinder could conclude fall within it or arbitrarily assumes a set of facts that no actual factfinder has ever found in this case.

2. Whether a federal habeas corpus court may apply a rule of "automatic affirmance" to a death sentence which was based on both constitutional and unconstitutional aggravating circumstances, when the law of the state that imposed the sentence requires the sentencer to weigh these aggravating circumstances against the mitigating circumstances in determining the penalty.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Willie Lee Richmond prays that the Court will grant certiorari to review the decision of the majority of the panel of the United States Court of Appeals for the Ninth Circuit issued December 26, 1990, rehearing denied October 17, 1991, affirming the dismissal of a habeas corpus petition which challenged his conviction of murder and sentence of death.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported; a copy of the opinion, as amended on December 18, 1991, is attached as Appendix A. A copy of the Court of Appeals' order denying rehearing and rehearing en banc, with four judges dissenting, is attached as Appendix B.

The opinion of the Supreme Court of Arizona affirming the Petitioner's death sentence is reported at 666 P.2d 57, and is attached as Appendix C. A copy of the trial court's sentencing decision, which is unreported, is attached as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was issued December 26, 1990; a timely Petition for Rehearing was denied on October 17, 1991. This Petition is being filed within 90 days of that date. Rule 13.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the law of the State of Arizona:

Arizona Revised Statutes § 13-703E, which provides:

> In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Arizona Revised Statutes § 13-703F, which provides in part:

> Aggravating circumstances to be considered shall be the following:
>
> * * *
>
> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

STATEMENT OF THE CASE

Petitioner Willie Lee Richmond is under a death sentence imposed upon by an Arizona judge, upon a general jury verdict finding him guilty of the murder of Bernard Crummett during a robbery in August, 1973. Although there was conflicting evidence as to who caused the victim's death, the other perpetrator of the crime, a white woman named Rebecca Corella, was not prosecuted.

Mr. Richmond's death sentence was vacated in 1978, as a result of a determination that the Arizona sentencing statute was unconstitutional under Lockett v. Ohio, 438 U.S. 586 (1978). At resentencing, despite substantial mitigating evidence, the same trial judge again sentenced Mr. Richmond to death. In a divided opinion, the Supreme Court of Arizona affirmed. State v. Richmond, 136 Ariz. 312, 666 P.2d 57, cert. denied, 464 U.S. 986 (1983); Appendix C.

After exhausting state remedies, Mr. Richmond filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona. The petition was summarily dismissed, on different grounds, three times. Different panels of the Court of Appeals reversed the first two orders of dismissal, and remanded. Richmond v. Ricketts, 730 F.2d 1318 (9th Cir. 1984), Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985). A third panel affirmed the third summary dismissal in the decision below. Appendix A. A timely petition for rehearing and suggestion for rehearing en banc was denied, with four judges dissenting. Appendix B.

1. The Offense and the Trial.

The decision of the panel below summarized the facts of the crime and the state prosecution as follows:

> On an August evening seventeen years ago, the victim [Bernard Crummett] met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have sex

> with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.
>
> Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.
>
> The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella - the testimony conflicts - told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:
>
> Q. [Mr. Howard, Prosecutor] Then what happened?
> A. [Erwin] Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.
> Q. And where did you go from there?
> A. Back to the Sands Motel.
> Q. Did you run over anything?
> A. Yes, a man. It was a bump, after we were leaving.
> Q. After you felt that bump, was anything said in the car when you felt that bump?
> A. Becky [Corella] said, it felt like a man's body.
> Q. Who was driving the car?
> A. Willy [sic].
>
> Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug

injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds[1] after the fatal blow. He concluded, therefore, that the victim was twice run over - once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith Erwin, she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

[1]We do not believe the record supports the statement that the two injuries occurred "at least thirty seconds" apart. The actual trial testimony of the State pathologist, Dr. Holka, was that the time frame would be "approximately twenty seconds, if the heart were faster than fifteen if slower than twenty-five. So, we are giving a slight edge there and agreeing to about thirty seconds."

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.

Appendix A 2-6.

2. The First Sentencing Hearing and Appeal.

Pursuant to Arizona law, the sentencing hearing was held before the trial judge alone.

In his sentencing verdict, the trial judge found two "aggravating factors": a prior conviction involving a threat of violence,[2] and the commission of the instant offense in "a specially heinous and cruel manner". Appendix E 3. The judge rejected the defendant's proffered mitigation, holding that it did not make out any of the mitigating circumstances listed in the Arizona law, and imposed a sentence of death. Ibid.

After this sentencing, Mr. Richmond's lawyers filed a Petition for Post-Conviction Relief, based on newly discovered evidence which substantiated the defense claim that Rebecca Corella was actually driving the getaway car when it accidentally ran over Bernard Crummett. The Petition was supported by affidavits from

[2]The elements of the prior conviction (which was for a kidnapping incidental to a robbery) did not necessarily include a threat of violence. That element was established for purposes of this sentencing by testimony that, during the crime, the robbery victim was threatened with a knife. Subsequent Arizona caselaw has held such testimony improper:

> In order to use the prior conviction for sentencing purposes, the State must show that the particular crime can be perpetrated only with the use or threat of violence. The court then may consider only the statute that defendant is charged with violating; it may not consider other evidence, or bring in witnesses, to establish the violence element.

State v. Schaaf, 819 P.2d 909, 919-20 (Ariz. 1991).

two people who swore that Ms. Corella had admitted this to them.[3] The trial court denied the Petition without a hearing.

On appeal, the Arizona Supreme Court affirmed Mr. Richmond's conviction and sentence, rejecting all his state law claims and constitutional objections to his death sentence. State v. Richmond 560 P.2d 41 (Ariz. 1976). The Court also affirmed the denial of the post-conviction relief petition, holding that Mr. Richmond was "criminally liable for this murder regardless of whether he or his accomplice was driving the vehicle at the time in question." 560 P.2d 49.

In 1978, the United States District Court for the District of Arizona granted a petition for a writ of habeas corpus, invalidating Mr. Richmond's death sentence on the ground that the Arizona death penalty statute was invalid "for failing to allow for consideration of relevant mitigating factors of an individual's character by the sentencing court when a determination is to be made whether or not the death penalty should be imposed." Richmond v. Cardwell, 450 F.Supp. 519, 526 (D. Ariz. 1978). In State v. Watson, 586 P.2d 1253 (Ariz. 1978), the Arizona Supreme Court reached the same conclusion, holding that "the restriction in the showing of mitigating circumstances in the sentencing provisions of

[3]In response to the Petitioner's motion, the prosecutor filed an affidavit which stated that during the trial Ms. Corella had "threatened to take the stand for the defense and take the blame for the murder," but defense counsel had elected not to call her. Attached to the affidavit was a transcript of a taped statement by Ms. Corella, in which she said that Willie Richmond was driving the vehicle when Bernard Crummett was run over, "once".

our death penalty statute ... was unconstitutional," but "that the statute remained in full force and effect" so that previously sentenced capital defendants could have their cases "remanded for resentencing". 586 P.2d at 1264. Petitioner's was among those cases so remanded in light of Watson.

3. The Resentencing and Second Appeal.

At the resentencing hearing, the State presented three witnesses, all of whom testified regarding the defendant's prior record.[4] The defense called sixteen witnesses, on two subjects. Members of Mr. Richmond's family, friends, and two prison staff members testified about substantial changes Mr. Richmond had undergone while on death row. Three witnesses were presented regarding Rebecca Corella's admissions that she, not Mr. Richmond, was driving the car when it ran over and killed Bernard Crummett.

The second sentencing verdict was announced on March 13, 1980. The judge found three aggravating circumstances--the original two, plus a third based on a homicide conviction entered after the first sentence was imposed.[5] Appendix D 3. As in the first sentencing order, with regard to the "heinous, cruel or depraved" aggravating

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[4]The state again offered testimony from the victim of the prior kidnapping to establish that crime involved a "threat of violence." See note 2, above.

[5]The homicide on which the new aggravating circumstance was based occurred before Bernard Crummett's, but the conviction occurred after this death sentence was imposed. See App. C 7. Mr. Richmond was also subsequently tried on a third murder charge, at which the state's primary witness was Rebecca Corella, and the defense was that the crime was, in fact, committed by Ms. Corella; the jury acquitted Mr. Richmond on that charge.

factor, the judge stated without elaboration "that the defendant did commit the offense in this case in an especially heinous and cruel manner." Ibid.

The judge found proved most of the matters the defense had submitted in mitigation, except the defendant's changed character, as to which it said it was "unable to make a definitive finding." Appendix D 4-5. Among the facts the Court found in mitigation were that "Rebecca Corella was involved in the offense but was never charged" and "the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to the premeditated murder." Id. at 4-6. The sentencing decision did not otherwise address the question of who was driving the car at the time it ran over Mr. Crummett and caused his death. It concluded:

> that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the defense, and having considered them separately and as a whole, the Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Id. at 6.

On appeal, with one Justice dissenting, the Arizona Supreme Court once again upheld petitioner's death sentence. Appendix C. Among other things, the state court held that the sentence did not violate Enmund v. Florida, 458 U.S. 782 (1982), because he was an "active participant" in the crime. Id. at C-7.

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of Enmund.

Ibid. Somewhat confusingly--because the trial judge plainly made no determination of which of the robbers was driving--the appellate court said "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." Ibid.[6] But its conclusion did not resolve the factual point:

> Under either version of the facts appellant does not fit within the sphere of defendants the Enmund court seeks to protect from capital considerations.

Ibid.

Although the court was unanimous on that, and several other legal points, there were three separate opinions, because the state Justices were divided as to the application of the "heinous, cruel or depraved" aggravating circumstance to the facts of this case. There was no disagreement on one point--that the trial court erred in finding the offense "especially cruel".

> We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain that that of the initial blow which rendered him unconscious.

Appendix C 8. The court was divided on the application of the remaining disjunctive terms of the "heinous" aggravating factor, however.

The two-Justice "majority" upheld the finding that the killing was "heinous" and said "the trial court could have found that the

[6]On a similarly uncertain basis, the appellate court said that petitioner "willingly assisted in the acts which were intended to cause the victim's death." Ibid. However, there was no direct evidence that anyone intended the victim's death; and the only circumstantial evidence of such an intent was in the hypothesized actions of the driver of the car.

offense was committed in an especially depraved manner." Ibid.

This is how they explained that conclusion:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra. In Gretzler, supra, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.
>
> The presence of any one of the three elements--cruel, heinous, or depraved--is sufficient to constitute an aggravating circumstance. State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

Appendix C 8.[7] The "majority" opinion then went on to conduct an "independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each." It concluded that "the mitigation offered by appellant is not sufficiently

[7]The panel opinion below quoted most, but not all of this language, omitting the last sentence of the first paragraph and the first sentence of the last paragraph. App. A 22. The panel opinion also omitted the sentences preceding these paragraphs, in which the Arizona Supreme Court "majority" had acknowledged that this crime could not be held to be "especially cruel." Ibid.

substantial to outweigh the aggravating circumstances," noting particularly the defendant's other murder conviction and "the gruesome manner in which this murder was committed. Id. at C-10.

Two Justices "concur[red] in the opinion of the majority except in its finding that this crime was especially heinous and depraved, and concur[red] in the result". Id. at C-13, based on the two other aggravating factors regarding the defendant's criminal record, which they found "places him above the norm of first degree murderers." See Id. at C-12. They did not discuss or weigh the mitigating evidence against those aggravating factors, in reaching this conclusion.

A fifth Justice dissented from the affirmance of the death sentence, agreeing "that the murder was not heinous and depraved," and arguing that the death penalty was inappropriate in light of the mitigation the defendant had shown. Appendix C 13-15. The mitigating evidence this Justice found most compelling was that which related directly to the remaining aggravating factors: the evidence of Mr. Richmond's changed character since the time of the crime and his conviction.

> Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional ... and, as a result, defendant has been given time which he has put to good use.

Appendix C 15 (dissenting opinion of Justice Feldman).

4. The Proceedings Below.

On January 6, 1984, Mr. Richmond's lawyers filed a Petition for Writ of Habeas Corpus in the United States District Court challenging his conviction and death sentence. The case was assigned to Judge Alfredo Marquez. On January 12, 1984--before the Respondent filed an answer--on his own motion, Judge Marquez summarily dismissed the Petition and refused to issue a certificate of probable cause to appeal. Mr. Richmond's lawyers appealed nonetheless, and on that appeal, the dismissal was reversed and remanded. Richmond v. Ricketts, 730 F.2d 1318 (9th Cir. 1984). On remand, Judge Marquez again summarily dismissed the petition and denied a certificate of probable cause. On appeal, the Court of Appeals again granted a certificate of probable cause and reversed and remanded. Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1985).

On the second remand, Judge Marquez again summarily dismissed the petition on his own motion, and again denied a certificate of probable cause, in a lengthy opinion which addressed the merits of the issues. Richmond v. Ricketts, 640 F.Supp. 767 (D. Ariz. 1986).

On appeal from that order, after granting a certificate of probable cause and then staying the case pending the resolution of Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), cert. denied 110 S.Ct. 3287 (1990), and Walton v. Arizona, 110 S.Ct. 3047 (1990), a panel of the Court of Appeals affirmed. Appendix A. A timely petition for rehearing was filed, and rejected by the panel.

Appendix B 4. A suggestion for rehearing en banc was simultaneously denied after a vote of the full circuit court, four judges dissenting. Appendix A 37-47. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court has previously examined Arizona's "heinous, cruel or depraved" aggravating factor, in Walton v. Arizona, supra, and Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Those decisions settled two basic points about this statute: (1) its unadorned language is facially vague and unconstitutional under Maynard v. Cartwright, 486 U.S. 356 (1988), and (2) the Arizona Supreme Court has developed a narrowing construction of the statutory language which meets Eighth Amendment standards, and which it can apply itself where trial courts do not. See Walton v. Arizona, 110 S.Ct. at 3056-58; Lewis v. Jeffers, 110 S.Ct. at 3102. Those two points were understood by both the panel and dissenting opinions below, see Appendix A 19, 38-9, and are not at issue here.

The questions presented here arise out of the manner in which the Arizona Supreme Court in this case exercised its power, established by Walton and by Clemons v. Mississippi, 110 S.Ct. 1441 (1990), to cure the trial court's improper application of this aggravating factor, and the Court of Appeals panel's alternative grounds for approving of the state courts' action.

The first of those questions involves the responsibility of a state appellate court which undertakes to "itself determine whether the evidence supports the existence of the aggravating circumstance

as properly defined," Walton v. Arizona, 110 S.Ct. at 3057, to resolve the facts predicate to that determination.

The second--which is presently pending before the Court in Sochor v. Florida, No. 91-5843--involves the circumstances in which an appellate court reviewing a death sentence based partly on an inapplicable aggravating factor must "determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty." Ibid.

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A REVIEWING COURT MAY APPLY A LIMITING CONSTRUCTION TO A FACIALLY VAGUE STATUTORY AGGRAVATING FACTOR IN A CAPITAL CASE, WITHOUT RESOLVING THE FACTUAL PREDICATE TO THAT APPLICATION.

In Parker v. Dugger, 111 S.Ct. 731 (1991), the Court examined a case in which a state appellate court had affirmed a death sentence, apparently on the basis of a mistaken assumption about the findings made by the trial court it was reviewing, regarding the mitigating circumstances that had been presented in the case. The Court held that the result of that state court process "deprived Parker of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 740. A similar deprivation occurred here, as a result of the actions of the "majority" Justices of the Arizona Supreme Court whose votes were essential to the affirmance of the death sentence in this case.

The sentencing decision the Arizona Supreme Court was faced with in this case was flawed, under both state and federal law. It rested on a determination that the crime for which Petitioner was convicted was "especially heinous and cruel." Appendix D 3. But

it was issued before the Arizona Supreme Court announced its decision in State v. Gretzler, 659 P.2d 1 (Ariz. 1983), which provided a limiting construction of those vague statutory terms;[8] and it included no explanation of the trial judge's understanding of them. The Arizona Supreme Court unanimously held its determination that the crime was "cruel" was erroneous. Appendix C 8. The remaining question was whether the crime could properly be called "heinous" or "depraved," under a limited construction of those terms.

To answer that, the "majority" opinion first recited the general "definition" that previous Arizona cases had given:

> "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." State v. Knapp, supra. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra....

Ibid. As this Court has twice unanimously held, such language alone adds no constitutionally significant "narrowing" to the facially vague statutory terms. See Shell v. Mississippi, 111 S.Ct. 313 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988).[9] However, the Arizona court "majority" went beyond that, and made the following statements, which paralleled (but did not track) some of the specific categories of "heinous" or "depraved" behavior delineated in State v. Gretzler, supra:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

Appendix C 8.

There are several possible interpretations of this passage. One--which we would submit it best supports--is that the Arizona

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[8]The Attorney General of Arizona summarized the Gretzler categories of "heinous" and "depraved" murders for this Court in Walton, as follows:

> The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. State v. Gretzler, 659 P.2d at 11.

Brief of Respondent at 46, Walton v. Arizona, No. 88-7351.

[9]See Shell v. Mississippi, 111 S.Ct. at 313-14 (concurring opinion of Justice Marshall):

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Shell v. State, 554 So.2d 887, 905-906 (Miss. 1989).
>
> "[T]he term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others." Cartwright v. Maynard, 822 F.2d 1477, 1488 (CA10 1987) (en banc).

Ibid. See also Moore v. Clarke, 904 F.2d 1226, 1229-30 (8th Cir. 1990).

"majority" simply relied on the totality of the circumstances, and especially the "ghastly" results of this incident, to determine that the crime was "heinous" and "depraved." If so, its decision plainly violates the teachings of Godfrey v. Georgia, 446 U.S. 420 (1980),[10] and Maynard v. Cartwright, supra.

> This approach of reviewing the totality of circumstances surrounding the murder was rejected by the Supreme Court in Maynard v. Cartwright. The Tenth Circuit, in the Maynard opinion affirmed by the Supreme Court, held that '[c]onsideration of all the circumstances is permissible; reliance upon all the circumstances is not.' 822 F.2d 1477, 1491 (10th Cir. 1987) (en banc).

Moore v. Clarke, 904 F.2d at 1233. See also Newlon v. Armontrout, 885 F.2d 1328, 1334-5 (8th Cir.), cert. denied 110 S.Ct. 3301 (1990).

The panel below did not address this possibility, however. Instead, it held that the only question before it was whether a "rational factfinder" could have concluded that the statutory factor, as narrowed by the state court's previous limiting construction, was established on the record of this case. Appendix A 24-25. It held that the state court could have reached such a conclusion. Id. at A-26.

Even assuming the panel was correct in its identification of the issue before it, however, the question remains whether the standard of Jeffers and Jackson v. Virginia, 443 U.S. 307 (1979)

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[10] "An interpretation of [an aggravating circumstance] ... so as to include all murders resulting in gruesome scenes would be totally irrational." Godfrey v. Georgia, 446 U.S. at 433 n.16.

can be met, without a resolution by the state court of the basic factual predicate for the application of any limiting construction of this aggravating factor: Who caused the victim's death? As the dissenting judges below noted:

> Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the tacit assumption that he was the driver. Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. ... The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Appendix A 41.

> The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." State v. Richmond, 666 P.2d 57, 63 (Ariz. 1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made any conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

Appendix A 42 n.4.

As these observations point out, the underlying problem with the Arizona Supreme Court majority's opinion on this issue is its failure to either take or assign responsibility for making the factual determinations which had to be made, in order to rationally

conclude[11] that petitioner's actions were "heinous" or "depraved" under any of the established limiting definitions of those terms. The opinion appears to rest its conclusion that those terms apply on the assumption that Mr. Richmond was driving; and it is difficult to conceive any other way that result could be reached. But the opinion never clearly resolves whether such a determination is necessary, and if so where and how it has been made.

As the dissent below argues, the answer best supported by the text of the state court "majority" opinion appears to be that the appellate judges believed the trial judge found Mr. Richmond was driving. If so, the resulting problem is the same as that in Parker v. Dugger, supra: "The [Arizona] Supreme Court erred in its characterization of the trial judge's findings, and consequently erred in its review of [Richmond's] sentence." 111 S. Ct. at 738.

Alternatively, the Arizona Justices may have, sub silentio, decided for themselves that Mr. Richmond was driving. But on the squarely conflicting testimonial record in this case, with the only trial level findings suggesting that Mr. Richmond may not have been the driver,[12] that would surely push, if not exceed, the limits of

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[11]Under Arizona law, before this or any other aggravating factor could be counted, it had to be proven to exist beyond a reasonable doubt. State v. Jordan, 614 P.2d 825, 828 (Ariz. 1980).

[12]See App. C 5 ("Rebecca Corella was involved in the offense but was never charged with any crime"); App. D 6 ("the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder").

appellate factfinding permitted by due process. See Cabana v. Bullock, 474 U.S. 376, 388 n.5 (1986); Appendix A 42-43.

The only remaining possibility is that the Arizona "majority" did not find it necessary to resolve this question, because it did not feel bound by the narrowing definitions of "heinousness" established by the Arizona caselaw. If that is the case, their decision clearly cannot be sustained, under the Eighth Amendment rule of Godfrey v. Georgia itself. See also Shell v. Mississippi, supra; Newlon v. Armontrout, 885 F.2d at 1335.

Under any of these alternative interpretations the panel decision below is in error; and its error is one which raises important questions about the limits of the deference to state court decisionmaking Lewis v. Jeffers requires. Although Walton and Jeffers let the states determine where the capital sentencing responsibility will reside, Parker holds that responsibility must reside somewhere. By endorsing a diffusion of that responsibility to the point that it is impossible to say whether, where, or how "the Arizona Supreme Court applied its narrowing construction of Arizona's subsec. (F)(6) aggravating circumstance to the facts of [this] ... case," see Lewis v. Jeffers, 110 S. Ct. at 3100, the decision of the panel below is irreconcilable with the Court's "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." Saffle v. Parks, 110 S.Ct. 1257, 1262 (1990).

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FEDERAL COURT MAY IGNORE A STATE'S DETERMINATION THAT ITS CAPITAL PUNISHMENT STATUTE REQUIRES A "WEIGHING" OF AGGRAVATING AND MITIGATING FACTORS AGAINST EACH OTHER.

As an alternative basis for its decision, the panel below held that any error respecting the "heinous" aggravating factor was irrelevant because two other aggravating circumstances remained. Appendix A 29. This holding--which was necessary to the disposition of this case, regardless of the correctness of the panel's first alternative ground for decision[13]--conflicts with the decisions of this Court in Walton and Clemons v. Mississippi, 110 S.Ct. 1441 (1990), and the Arizona Supreme Court's interpretation of its own death sentencing statute.

The effect on a sentence of a decision invalidating one of several aggravating circumstance on which it was based depends, first, on the role of aggravating circumstances under state law. Zant v. Stephens, 456 U.S. 410 (1982); Zant v. Stephens, 462 U.S. 862, 873 (1983). Arizona's statute provides that once an aggravating circumstance is found, the sentencing decision turns on whether any mitigating circumstances are "sufficiently substantial to warrant leniency." A.R.S. § 13-703E. Although the statute does not explicitly say that the "substantiality" of any mitigating

[13]The panel's determination that any error in applying the "heinous" aggravating factor was irrelevant goes to support both the state court "majority" opinion (as to which it stands as an alternative ground) and the state court concurring opinion (as to which it is the only possible ground for affirmance). Unless both of these two-state-Justice opinions are valid, petitioner's death sentence cannot stand--because the fifth state Justice voted to reverse it. See App. C 14.

factors depends, in part, on the number and nature of the aggravating factors found, the Arizona Supreme Court has repeatedly so held.

> [The trial court and this] court on review must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." ... This necessarily involves the difficult weighing and balancing of the aggravating and mitigating circumstances present.

State v. Gretzler, 659 P.2d 1, 13 (Ariz. 1983).

> We have described the formula of "sufficiently substantial to call for leniency" as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance.

State v. Harding, 670 P.2d 383 (Ariz. 1983).[14] Indeed, in its review of the sentence in this case, the Arizona Supreme Court "majority" said "the mitigation offered by appellant is not sufficient to outweigh the aggravating circumstances"--which, in its view, included the "heinous" aggravating factor and "the gruesome manner in which this murder was committed." Appendix C 11. The premise of this resentencing requirement is that different numbers of aggravating factors carry different weights. See State v. Schaaf, 819 P.2d at 921 ("[w]e do not know and cannot ascertain whether the trial court would have found the mitigating circumstances sufficient to overcome the single remaining aggravating circumstance.").

[14]See also State v. Fierro, 804 P.2d 72, 81 (Ariz. 1990); State v. Jimenez, 799 P.2d 785, 794 (Ariz. 1990); State v. Serna, 787 P.2d 1056, 1065 (Ariz. 1990); State v. Marlow, 786 P.2d 395, 402 (Ariz. 1989); State v. Rossi, 706 P.2d 371, 379 (Ariz. 1985); State v. Brookover, 601 P.2d 1322, 1326 (Ariz. 1979).

Consistent with this, and its limited appellate role in the sentencing-determination process, the Arizona Supreme Court has established as its "usual practice in a case such as this is to remand to the trial court for reconsideration of the death sentence in light of our findings of aggravation and mitigation." State v. Fierro, 804 P.2d at 88. "[I]f one of the two statutory aggravating circumstances found by the trial court is set aside, we must remand for resentencing." State v. Schaaf, 819 P.2d at 920; see also, e.g., State v. Hinchey, 799 P.2d 352 (Ariz. 1990); State v. Lopez, 786 P.2d 959, 963 (Ariz. 1990); State v. Gillies, 662 P.2d 1007, 1023 (Ariz. 1983).

Despite this clear and definitive construction of this statute by the Arizona state courts, the panel below held exactly the opposite. It declared "[i]nvalidation of an aggravating circumstance does not mandate reweighing or require resentencing...." Appendix C 29. It denied that "the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense...." Appendix A 30. In effect--although not, in its amended opinion, in word[15]--the panel held "without citing any caselaw, that Arizona is not a weighing state." Appendix A 44. As the dissenting Judges

[15]The original panel opinion summarized its analysis in the direct declaration that "the statute at issue here is not a weighing statute." Richmond v. Lewis, 921 F.2d at 947. On rehearing, this phrase was deleted, but the panel's analysis was not changed. See App. A 29.

below showed, this cannot be squared with the language of Arizona's law, or the manner in which the Arizona courts have construed it.

> Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing. Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances.

Appendix A 44.

> In Richmond's case, the trial court found that there were a number of mitigating circumstances. See State v. Richmond, 666 P.2d 57, 65 (Ariz. 1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors. The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

Appendix A 46. To fail to require that violates not only established Arizona law, but the Eighth Amendment principle reiterated in Clemons v. Mississippi:

> An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586 ... (1978), and Eddings v. Oklahoma, 455 U.S. 104 ... (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. Barclay v. Florida, 463 U.S. 939, 958 ... (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450.

The decision below on this point places the Ninth Circuit in conflict with the Arizona Supreme Court, regarding the very nature of the task that both sentencing and reviewing courts are to perform in Arizona capital cases. That potentially impacts not only the 100-plus Arizona death sentences pending at various stages of state and federal review, but also every case at the trial level--where sentencing judges, presumed to know and follow the law, Walton v. Arizona, 110 S.Ct. at 3057, must decide how and what to weigh in the balance of life and death. It has similarly sweeping implications for the several other states whose sentencing statutes use formulae similar to Arizona's.[16] It evidences a misinterpretation of Clemons' teachings--and the general principles of federal harmless error analysis, from which Clemons derives--

[16]There are at least four other states---including two in the Ninth Circuit--whose capital sentencing statutes make the sentence depend on the "sufficiency" of mitigating circumstances. Illinois Ann. Stat. ch. 38, para. 9-1(g); Montana Code Ann. § 46-18-305; Nebraska Rev. Stat. § 29-2522; Washington Rev. Code § 10.95.060(4).

which do not admit mechanistic rules which simply pretend the error did not occur, without acting to cure it. Cf. Pensinger v. California, 60 U.S.L.W. 3302 (U.S., October 22, 1991) (dissenting statement of Justices O'Connor and Kennedy).

As the grant of certiorari in Sochor v. Florida suggests, the lower courts are in need of further clarification of these principles, and their application to the varieties of state capital punishment laws. Because the panel's decision underscores that need, because it denies petitioner the fully individualized sentencing determination which was his right under the Eighth Amendment, and because it conflicts directly with the decisions of the Arizona Supreme Court itself, review should be granted here and the panel decision reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended December 18, 1991

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain, Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain; Dissent by Judge Pregerson, with whom Judges Hug, Norris and Reinhardt join.

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*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

OPINION

O'SCANNLAIN, Circuit Judge:

Willie Lee Richmond, who was sentenced to death upon conviction of first-degree murder in Arizona state court, appeals from the district court's denial of his petition for habeas corpus. He contends that imposition of capital punishment will violate his rights under the sixth, eighth, and fourteenth amendments. We now affirm.

I

A

This case arises from Richmond's conviction in 1974 for first-degree murder in the death of Bernard Crummett. On an August evening seventeen years ago, the victim met Rebecca Corella, a nude dancer, at the Bird Cage Bar in Tucson, Arizona. After leaving the bar, the pair met Richmond in the bar's parking lot where Corella attempted to persuade Richmond to allow his fifteen-year-old girlfriend, Faith Erwin, to prostitute herself with Crummett. Richmond and Erwin refused, and after a brief conversation, Corella agreed to have

sex with Crummett herself. Crummett thereupon produced a twenty-dollar bill, which Corella handed to Richmond and which Richmond palmed and surreptitiously exchanged for a ten. A brief argument ensued as Richmond and Corella insisted that Crummett had only given them ten dollars.

Crummett eventually yielded and agreed to pay more. As he reached into his wallet a second time, Corella observed what seemed a considerable amount of cash, and she communicated her observation to Richmond. All four individuals then proceeded in a borrowed station wagon to Corella's motel-room apartment. There, just as Corella and Crummett emerged from the bedroom, Richmond whispered to Erwin his intention that they rob Crummett, explaining that they should not commit the crime in the apartment because Crummett might remember the surroundings.

The group then left the motel and with Richmond as their driver proceeded to the end of a road on the outskirts of Tucson. Richmond thereupon stopped the car, and either Richmond or Corella — the testimony conflicts — told Crummett to get out because the car had suffered a flat tire. Richmond then assaulted Crummett, beating him with his fists and knocking Crummett to the ground. As Crummett lay motionless, Richmond pelted him with rocks. Corella, meanwhile, grabbed Crummett's wallet. According to Erwin, who admitted that she was vomiting and "coming down" from heroin during the incident, the following events then transpired:

> Q. [Mr. Howard, Prosecutor]
> Then what happened?
>
> A. [Erwin]
> Well, they all got in the car, and Becky [Corella] was getting the wallet and what else, you know. I looked over to see what else was taken. And Becky [Corella] was getting the wallet and we came in the car and left.

Q. And where did you go from there?

A. Back to the Sands Motel.

Q. Did you run over anything?

A. Yes, a man. It was a bump, after we were leaving.

Q. After you felt that bump, was anything said in the car when you felt that bump?

A. Becky [Corella] said, it felt like a man's body.

Q. Who was driving the car?

A. Willy [sic].

Under cross-examination, Erwin stood by her contention that Richmond had been the driver at the time the car ran over Crummett. She admitted, however, that she was suffering greatly under the influence of her drug injections at the time and that she was lying back on the car seat with her eyes closed.

The police found Crummett's body at five o'clock the following morning. The examining pathologist testified at trial that the body exhibited signs of three forms of extreme force. First, there were wounds and indentations in the head consistent with a contention that the victim had been pummeled with rocks. In conjunction with this observation, he noted that several blood-stained rocks were found in the immediate vicinity of the body. Second, he testified that the victim's head had suffered severe trauma and "bursting" from a crush injury most probably attributable to an automobile tire. He identified this second injury as the probable cause of death. Third, he testified to the presence of a second crush injury along the trunk and the abdominal section. This too the

pathologist attributed to an automobile tire, which impacted the body from the opposite direction at least thirty seconds after the fatal blow. He concluded, therefore, that the victim was twice run over — once while alive but presumably unconscious and a second time after death. A police detective also testified to the discovery of human blood and hair on the undercarriage of the recovered station wagon.

Shortly after the night of Crummett's death, Richmond was arrested on two unrelated murder charges. As he awaited proceedings on those charges in jail, he was served with an arrest warrant for the murder of Crummett, and he agreed to waive his rights and make a statement at that time. Although he admitted to robbing and beating Crummett, he claimed that he was not the driver when Crummett was run over. In his statement, which was taped and played at trial, Richmond insisted:

> I opened the door. I snatched the dude out by his collar, and bam, he falls straight out. I wanted to go through his pockets, but she [Corella] was already going through his pockets and he was getting up and I reached down and punched him again. So my old lady, Faith [Erwin], she couldn't take it. She got out of the car and she looked and she started crying, you know. And about that time I am looking at her, and going through his change. And this rock, you know, like that, and dip, dip like that, you know. And I said, wow, to myself, you know. Come on let's get in the car and me and her [Erwin] get in the car, and I am talking to her [Erwin] and Rebecca [Corella] gets in the car and she backed up and she throws up in gear and comes back over. And we were going on down further and she was all over the fucking road, and said, give me this mother-fucking car and let me drive, you know.

At the conclusion of the evidentiary phase of the trial, the judge instructed the jury that Richmond could be convicted of

first-degree murder upon either a finding of premeditation or a felony-murder theory:

> Murder is the unlawful killing of a human being, with malice aforethought.
>
> * * * *
>
> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the perpetration of, or attempt to perpetrate, the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.
>
> * * * *
>
> If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all person[s] who either directly and actively commit the act constituting such crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are guilty of murder in the first-degree, whether the killing is intentional, unintentional, or accidental.

Upon these and other instructions, the jury found Richmond guilty of first-degree murder on February 5, 1974.[1]

[1]On August 9, 1974, Richmond was convicted of first-degree murder on one of the two unrelated charges and sentenced to life imprisonment. "It is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond v. Ricketts*, 640 F. Supp. 767, 780 (D. Ariz. 1986). At the time of that earlier murder, "the death [penalty] had not yet become effective [in Arizona] so that the sentence of life imprisonment was the only possible sentence." *Id.* Richmond was acquitted of the other murder. *See id.*

B

After a separate hearing held before the trial judge alone, the court pronounced its sentence:

> The court rendered a special verdict finding the existence of two aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or a threat of violence on other persons, and 2) that the defendant had committed the offense in an especially heinous and cruel manner. It found none of the statutory mitigating circumstances to be present. Based on its findings, the court sentenced the defendant to death.

State v. Richmond, 114 Ariz. 186, 189, 560 P.2d 41, 44, *cert. denied*, 433 U.S. 915 (1976).

Richmond petitioned in state court for post-conviction relief claiming the discovery of new exculpatory evidence. He presented an affidavit from Daniel McKinney, a former boyfriend of Corella, in which McKinney stated that Corella had admitted to being the driver when the car ran over Crummett. The state countered with a transcribed tape recording in which McKinney claimed that Richmond had threatened him in prison. The petition for relief was denied. On automatic appeal, the Arizona Supreme Court affirmed both the conviction and the sentence, holding inter alia that (1) Richmond's case was properly submitted on a theory of felony murder, (2) post-conviction relief was properly denied, and (3) the Arizona death penalty statute was constitutional, both as written and as applied. *See* 114 Ariz. at 190-98, 560 P.2d at 45-53.

After the United States Supreme Court denied certiorari on direct appeal, Richmond petitioned for a writ of habeas corpus in the federal district court of Arizona. He argued that the Arizona statute unconstitutionally deprived him of the opportunity to present non-statutory mitigating circumstances before

the judge at sentencing. The district court upheld Richmond's conviction but ruled the Arizona statute unconstitutional under the eighth and fourteenth amendments for its failure to allow consideration of a convict's character. *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978). The court therefore vacated Richmond's sentence.[2]

At a second sentencing hearing in March 1980, the state trial court again found no mitigating circumstances sufficient to warrant leniency, and it resentenced Richmond to death. Once again, on mandatory appeal, the Arizona Supreme Court affirmed the sentence. *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, 464 U.S. 986 (1983). Independently reviewing the record,[3] the state supreme court found that Richmond had actively participated in the robbery and had played an integral role in the events leading up to Crummett's death. Although it acknowledged that the force of Richmond's manual blows had not caused the death, the court held that circumstantial evidence supported Erwin's testimony that Richmond had been the lethal driver. It found that the sentence was appropriate under these conditions. Again on direct review, the United States Supreme Court denied certiorari. 464 U.S. 986 (1983).

Richmond then pursued a second writ of habeas corpus in federal court. After a brief hearing, the district court denied the writ and dismissed the petition. Four days later, a panel of this court stayed Richmond's execution and issued a certificate of probable cause to provide time for a full-fledged appeal. In due course, the court affirmed dismissal for failure to exhaust state remedies, but it remanded with instructions to allow amendment to permit the prosecution of any claims that

[2]The Arizona death penalty statute was subsequently revised to cure this defect. *See* Ariz. Rev. Stat. Ann. § 13-703(G), *as amended by* 1979 Ariz. Sess. Laws ch. 144, § 1 (effective May 1, 1979).

[3]*See infra* note 10.

had been properly exhausted.[4] *Richmond v. Ricketts*, 730 F.2d 1318 (9th Cir. 1984). Following such amendment, the district court again denied Richmond's petition, and this court again reversed, remanding for a full review of the state record. *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985). After reviewing the full record, the district court denied Richmond's petition for the third time in a thirty-five page opinion. *Richmond v. Ricketts*, 640 F. Supp. 767 (D. Ariz. 1986).

Richmond now appears before this court with the assistance of counsel to appeal this most recent denial order. This court originally entertained oral argument in his appeal on September 18, 1987, but deferred submission pending the en banc decision of this circuit in *Adamson v. Ricketts*. *See* No. 84-2069 (9th Cir. Aug. 14, 1987) (en banc) (order scheduling oral argument for Oct. 20, 1987, in light of *Ricketts v. Adamson*, 483 U.S. 1 (1987)). *Adamson* presented a similar challenge to the constitutionality of Arizona's revised death penalty statute. A year later, in December 1988, the *Adamson* court ruled the Arizona statute unconstitutional. 865 F.2d 1011 (9th Cir. 1988) (en banc). Arizona petitioned the Supreme Court of the United States for review of that decision, and this court further deferred submission pending that outcome.

In the meantime, on direct review from the state's highest court, the Supreme Court of the United States announced in *Walton v. Arizona* that the Arizona death penalty statute is *not* unconstitutional. 110 S. Ct. 3047 (June 27, 1990), *reh'g denied*, 111 S. Ct. 14 (Aug. 30, 1990). In a companion case

[4]Under the "total exhaustion rule" announced by the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 (1982), a federal court cannot adjudicate a habeas petition if it contains any unexhausted claims — even if it also contains exhausted claims. The remand order was intended to satisfy this rule. *See* 730 F.2d at 1318.

Upon amending his petition, Richmond continued to assert eighteen claims. *See* 774 F.2d at 959.

decided that same day, *Lewis v. Jeffers*, the Court restated and elaborated upon its *Walton* holding. 110 S. Ct. 3092, *reh'g denied*, 111 S. Ct. 14 (1990). On the following day, the Court denied certiorari in *Adamson*. *Lewis v. Adamson*, 110 S. Ct. 3287 (1990), *denying cert. to Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc).

In light of these developments, this court ordered the parties to file supplemental briefs, and on September 27, 1990, the court entertained a second oral argument to consider the effects of *Walton*, *Jeffers*, and other recent Supreme Court decisions on this appeal. The court thereafter took the entire appeal under submission for decision.

II

A

The district court had proper jurisdiction under 28 U.S.C. § 2241. This court has proper jurisdiction under 28 U.S.C. § 2253. We review the denial of a habeas corpus petition de novo. *See Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). However, under 28 U.S.C. § 2254(d), the factual findings of state trial and appellate courts are presumed correct if fairly supported by the record. *See Sumner v. Mata*, 449 U.S. 539, 546-47 (1981).

B

Richmond has presented four arguments: (1) that Arizona's death penalty law is unconstitutional both on its face and as applied, (2) that the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death and that imposition of the death penalty would therefore violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982), (3) that he was improperly denied an evidentiary hearing on his claim that Arizona's administration of the death penalty is unconstitutionally discriminatory, and (4) that fulfillment of

his sentence after so many years on death row would constitute cruel and unusual punishment. Respondent Arizona has challenged all four contentions and has further argued that Richmond's petition constitutes an abuse of the writ. We address the state's latter contention first and then address Richmond's arguments sequentially.

III

In its 1978 judgment on Richmond's first petition for habeas relief, the district court vacated Richmond's sentence but affirmed his conviction. The State of Arizona argues that because Richmond failed to appeal the affirmance of his conviction at that time, it is abuse of the writ to challenge the conviction now. *See* 28 U.S.C. § 2244(b); Rules Governing Section 2254 Cases, Rule 9(b). A prior panel of this court has already addressed this contention. *See Richmond*, 774 F.2d at 959-61. We are bound to adopt its conclusions as the law of the case. *See Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391, 392 (9th Cir. 1981); *see also* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1988) ("If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.").

[1] Thus, to the extent that Richmond seeks to challenge his conviction on grounds that were available to him when he filed his first petition, we agree that he is barred from doing so now:

> The relief obtained on the first petition went only to the sentence. The incentive remained, therefore, for Richmond to appeal the rejection of his challenges to the *underlying conviction*, since if he were to prevail on appeal on these claims, he could not be resentenced. The district court could properly decline to reconsider these underlying-conviction claims when raised in a second petition.

Richmond, 774 F.2d at 960 (emphasis in original). Whether termed abuse of the writ or res judicata, the reassertion of such claims is not permissible at this stage.

[2] Richmond, however, has focused his attention in the current appeal on challenging the re-imposition of his sentence. This he certainly may do, and in so doing, he may challenge the death penalty on grounds that were available to him but that he did not raise when contesting his first sentence:

> Previously unadjudicated claims must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing "needless piecemeal litigation," or has raised the claims only to "vex, harass, or delay." None of these three situations applies to Richmond's petition.

Id. at 961 (citing *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Richmond may also renew challenges to the death penalty that were raised in his first petition and *decided against him* by the district court:

> [W]hen the district court enjoined Richmond's [initial] death sentence, it relied solely on the [original] Arizona statute's failure to consider mitigating factors of an individual's character. *Richmond v. Cardwell*, 450 F. Supp. at 526. Because Richmond had obtained the sentencing relief he sought, he had no incentive to appeal the adverse determination of his other grounds for challenging the death sentence, and perhaps would not have been permitted to do so on mootness or ripeness grounds. The ends of justice would not be served by denying Richmond appellate consideration of these other constitutional challenges to the death penalty merely because he obtained relief on a different ground.

Id. at 960. With respect to any of the proffered challenges to his sentence, therefore, "Richmond's petition does not constitute an abuse of the writ." *Id.* at 961.

IV

A

At the time of Richmond's conviction in 1974, Arizona law defined first-degree murder in relevant part as follows: "A murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery . . . is murder of the first degree." Ariz. Rev. Stat. Ann. § 13-452 (repealed 1978) (current version at § 13-1105). For those convicted of first-degree murder, the Arizona code provides a sentencing hearing independent of the trial. § 13-703(B). Here, the trial judge must choose without the assistance of a jury between the options of life imprisonment and capital punishment. § 13-703(A)-(B). For purposes of this determination, a special verdict is required regarding the existence or non-existence of any aggravating or mitigating factors. § 13-703(D). The statute puts the burden of establishing the existence of any aggravating factors on the prosecution and the burden of establishing the existence of any mitigating factors on the defense. § 13-703(C). The statute then channels the court's discretion:

> [T]he court . . . shall impose a sentence of death if the court finds *one or more* of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

§ 13-703(E) (emphasis added).

Subsection F enumerates ten aggravating circumstances, including the following three:

(1) The defendant was previously convicted of a felony in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

* * * *

(6) The defendant committed the offense in an especially heinous, cruel or depraved manner.

§ 13-703(F). By the time of Richmond's resentencing in 1980, subsection G of the statute had been revised to read as follows:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any circumstances of the offense, including but not limited to [(1) the defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, (2) the defendant's suffering of unusual or substantial duress, (3) the defendant's relatively minor participation in the crime, (4) the defendant's reasonable inability to foresee that his conduct would cause or would create the grave risk of causing death, and (5) the defendant's age].

§ 13-703(G).

B

Richmond challenges the constitutionality of this revised sentencing scheme on four grounds. First, he contends that

judicial determination of the existence or nonexistence of aggravating circumstances impermissibly usurps the jury's fact-finding function. Second, he claims that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifts the burden of proof. Third, he argues that the Arizona statute creates an unconstitutional presumption that death is the proper sentence. Finally, he insists that imposing the death penalty upon finding that the killing was "especially heinous, cruel or depraved" is unconstitutionally vague.

[3] The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected the first three contentions, and Richmond has not forcefully advanced these arguments since.[5] With respect to the judicial determination of sentencing factors, the Court stated: " 'Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.' " *Walton*, 110 S. Ct. at 3054 (quoting *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446 (1990)). Indeed, even before *Walton*, it was well settled that " 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' " *Id.* (quoting *Hildwin v. Florida*, 490 U.S. 638, _, 109 S. Ct. 2055, 2057 (1989)); *see generally id.* at 3054-55 (Part II of the opinion). As the district court noted when it rejected this argument in Richmond's first petition:

[5]We have already had occasion to note *Walton*'s rejection of the first and third contentions. *See Smith v. McCormick*, 914 F.2d 1153, 1169-70 (9th Cir. 1990). We also note in passing that Richmond's able and experienced counsel, Timothy K. Ford, is intimately familiar with the *Walton* case. Mr. Ford represented Jeffrey Alan Walton in his petition before the United States Supreme Court. This fact — in addition to the cases' underlying similarity — may help to explain why several of the arguments raised here are identical to arguments decided by the Court in that case. *See infra* note 7 (noting the factual similarities between the two cases).

> "[The Supreme Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Richmond, 450 F. Supp. at 523 (quoting *Proffitt v. Florida*, 428 U.S. 242, 252 (1976)).[6]

[4] The *Walton* Court likewise rejected the contention that requiring the defendant to establish the existence of mitigating factors impermissibly shifts the burden of proof. Denying that the practice violates the eighth and fourteenth amendments, the Court ruled:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

[6]Since the *Walton* decision, Richmond has apparently conceded that the sixth amendment does not require jury factfinding at the sentencing phase in capital punishment cases, but he has stressed the alternative argument that the equal protection clause *does* require jury factfinding at sentencing. Because Arizona law provides for jury factfinding in many similar circumstances, Richmond contends, it is arbitrary and irrational not to provide for it here. We find this argument unpersuasive. As the Supreme Court noted in *Proffitt*, there is indeed a rational reason for committing the factfinding function to the judge at the sentencing phase in capital punishment cases, and it probably promotes more evenhanded justice to do so. *See Proffitt*, 428 U.S. at 252. Moreover, the Court's sixth amendment holding on this issue in *Walton* would make little sense if the broader, less specific terms of the equal protection clause could be read to require the opposite result.

Walton, 110 S. Ct. at 3055; *see generally id.* at 3055-56 (Part III of the opinion).

[5] Finally, the *Walton* Court also rejected the claim that the Arizona statute creates an impermissible presumption that death is the proper sentence for first-degree murder. Like Richmond, Walton had challenged the statute's directive that a court "*shall* impose a sentence of death" if it finds one or more aggravating circumstances and no substantial mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). Walton had contended, as Richmond does here, that this provision violates the proscription against mandatory death sentences announced in *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court disagreed, citing its recent decisions in *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), and *Boyde v. California*, 110 S. Ct. 1190, *reh'g denied*, 110 S. Ct. 1961 (1990), both of which had upheld similarly worded capital punishment laws. The Court ruled that so long as the statute provides individualized sentencing and does not automatically impose death for certain categories of murder, it passes constitutional muster under *Woodson*. *See generally Walton*, 110 S. Ct. at 3056 (Part IV of the opinion).

In short, the Supreme Court has specifically rejected three of the constitutional arguments raised here, and it has done so in the context of reviewing the very same statute.

C

Richmond insists, however, that his fourth constitutional challenge to the statute survives *Walton*. Indeed, he contends that *Walton* itself renders his death sentence unconstitutional and that this court's en banc decision in *Adamson v. Ricketts* mandates resentencing. *See Adamson*, 865 F.2d 1011 (9th Cir. 1988) (en banc), *cert. denied sub nom. Lewis v. Adamson*, 110 S. Ct. 3287 (1990). We are not persuaded.

In *Walton*, another Arizona inmate who was convicted of first-degree murder and sentenced to death challenged his sentence on constitutional grounds.[7] The Supreme Court denied all four of his claims and affirmed the sentence. Despite this result, Richmond contends that Walton's fourth claim and the Court's disposition of that claim bolster his petition.[8]

[7]The facts of the *Walton* case are strikingly similar in many respects to the facts of the present case. Walton, who also acted with the assistance of two friends, "went to a bar in Tucson, Arizona, . . . intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert . . . . In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine." 110 S. Ct. at 3052. Forcing Powell to accompany them, the three commandeered his car and drove to a remote area on the outskirts of town. When they stopped, they

> forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. . . . Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told [his two accompanying friends] that he had shot Powell and that he had "never seen a man pee in his pants before."

Id. Despite the similarities, the circumstances of Powell's death were somewhat more gruesome than those of Crummett's:

> Powell's body was found approximately a week later .... A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

Id.

[8]Walton's first three claims, which were also raised by Richmond, were the three claims discussed in Part IV-B above. First, Walton alleged that "every finding of fact underlying the sentencing decision must be made by a jury, not by a judge." 110 S. Ct. at 3054; *compare* Ariz. Rev. Stat. Ann. § 13-703(B). Second, he alleged that the Arizona statute unconstitutionally "imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances." 110 S. Ct. at

In his fourth claim, Walton alleged that the aggravating circumstance found and relied upon by the sentencing judge — his commission of the crime "in an especially heinous, cruel or depraved manner" — was unconstitutionally vague. Ariz. Rev. Stat. Ann. § 13-703(F)(6); *see* 110 S. Ct. at 3056-57. The Supreme Court agreed that the relevant statutory provision was vague but did not agree that it was unconstitutional. In essence, the Court held that facial vagueness alone does not decide the question: one must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions — and even extra-statutory procedural safeguards — may preserve the scheme's constitutional integrity. *See generally Walton*, 110 S. Ct. at 3056-58 (Part V of the opinion).

The Court found three such safeguards within Arizona law. First, the Arizona scheme provides for sentencing by a judge, not by a jury. That fact alone distinguished *Walton* from *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), two cases relied upon by Walton in which the Supreme Court had invalidated death sentences due to similarly vague statutory definitions of aggravating circumstances. Where a judge makes the sentencing findings there is less danger of impermissibly broad applications of statutory terms: "Trial judges are presumed to know the law and to apply it [correctly] in making their decisions." *Walton*, 110 S. Ct. 3057.

Second, the Court found, the Arizona Supreme Court had effectively salvaged the suspect provision by affording it a

3055; *compare* Ariz. Rev. Stat. Ann. § 13-703(C). Third, he alleged that the Arizona statute "creates an unconstitutional presumption that death is the proper sentence" because it *requires* the death penalty "if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency." 110 S. Ct. at 3056; *compare* Ariz. Rev. Stat. Ann. § 13-703(E). The Supreme Court rejected all three of these claims as well as the fourth, which is discussed herein.

"limiting definition" in the course of reviewing the trial judge's sentencing decision. What the state legislature had improvidently left out, the state supreme court properly inserted:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." . . .
>
> * * * *
>
> Recognizing that the proper degree of definition of an aggravating factor is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision *by the Arizona Supreme Court* is constitutionally sufficient because it gives meaningful guidance to the sentencer.

Id. at 3057-58 (quoting *State v. Walton*, 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)) (emphasis added). By injecting this limiting definition into a sentencing process already restricted to judges, Arizona provided ample protection for Walton's constitutional rights.

> If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is *irrelevant* that the statute itself may not narrow the construction of the factor.

Id. at 3057 (emphasis added).

Third, the Court reasoned:

> [E]ven if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. _, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

Id.

In his reliance on *Walton*, Richmond points out as an initial matter that the same aggravating circumstance at issue in that case was cited by the Arizona Supreme Court in its review of his death sentence. Richmond insists that the terms of this aggravating circumstance — "especially heinous, cruel or depraved" — are facially vague. He is undeniably correct; *Walton* held so explicitly. Richmond then argues, however, that whereas the Arizona Supreme Court cured this potential defect in *Walton*, it failed to do so in his case. The court, he maintains, applied no comparable "limiting construction" in its review of his sentence. This contention is empirically incorrect.

[6] In reviewing Richmond's sentence, the Arizona Supreme Court quite clearly *did* provide a limiting construction for the admittedly vague aggravating circumstance. In fact, if anything, the state court provided a more narrowly tailored and more obviously sufficient limiting construction in Richmond's case than it did in Walton's:

> "Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive man-

ner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S. Ct. 1458, 55 L. Ed. 2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler*, [135 Ariz 42, 659 P.2d 1 (1983)]; *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan*, *supra*. . . .

"Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp*, *supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler*, *supra*; *State v. Poland*, *supra*; *State v. Lujan*, *supra*. In *Gretzler*, *supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. . . .

. . . We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979).

Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64 (plurality opinion) (finding Crummett's killing especially heinous and depraved but not especially cruel);[9] *compare id. with Walton*, 159 Ariz. at 586-88, 769 P.2d at 1032-34.

[7] As in *Walton*, the sentence in this case was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction.[10] Under a fair reading of *Walton* and the record alone, therefore, Richmond's contentions must fail.

[8] Richmond attempts to avoid this conclusion by challenging the legal accuracy of the Arizona Supreme Court's limiting construction. He cites several state court decisions, most notably *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1

[9]Richmond argues that only two of the five Justices of the Arizona Supreme Court concurred in this portion of the court's opinion. He is correct. Two other Justices voted to affirm the sentence but on other grounds. They explicitly rejected the argument that the killing had been especially heinous and depraved. *See Richmond*, 136 Ariz. 322-24, 666 P.2d at 67-69 (Cameron, J., concurring and Gordon, V.C.J., joining). The fifth Justice dissented altogether. *See* 136 Ariz. 324-26, 666 P.2d at 69-71 (Feldman, J., dissenting). The fact that a majority of the court did not concur in this finding, however, does not deny that the Justices who did concur in it provided an adequate limiting construction. The relevant point is that members of the court who premised their votes on the challenged factor undertook the deliberations and analysis constitutionally required.

More importantly, Richmond's observation is irrelevant in light of the fact that *four* Justices concurred in the finding of two other aggravating circumstances, either one of which could constitutionally have justified imposition of the death penalty. *See infra* Part IV-D.

[10]*See Richmond*, 136 Ariz. at 317, 666 P.2d at 62 ("[I]n each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case . . ."); 136 Ariz. at 320, 666 P.2d at 65 ("In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give to each. We also independently determine the propriety of the sentence.").

(1983), for the proposition that the court applied a definition of the aggravating circumstance that is untenable under Arizona law. This court, however, is foreclosed from engaging in any such inquiry. A federal appellate court cannot challenge the Arizona Supreme Court on matters of Arizona law; in that realm, the authority of the state court remains supreme.

Both *Walton* and its companion case, *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), support this analysis. As *Walton* pointed out, the relevant focus for this court's attention is not upon the language of the Arizona statute per se or even upon the sentencing decision of the state trial judge; rather, it is upon the constitutional legitimacy of Richmond's sentence as that sentence stands *today* after review by and exhaustion of the state court process. *See Walton*, 110 S.-Ct. at 3057-58. The only question for this court is whether the *final* state result violates constitutional law so as to warrant granting a writ of habeas corpus. *Walton* requires this court to pay due deference to state judicial systems in the administration of their own criminal sanctions and to recognize both the competence and duty of state courts of general jurisdiction to enforce federal constitutional law.

Jeffers thoroughly reinforces the *Walton* rule. In *Jeffers*, the Supreme Court restated and reapplied the *Walton* holding to deny another Arizona prisoner's challenge to the legitimacy of his death sentence. Because *Jeffers* was before the Court on collateral review, the Court concluded that even greater deference was owed to the state system than the Court had urged in *Walton*, which it had heard on direct review. The Court never reached the merits of Jeffers's constitutional claims, and it certainly never approached any questions of state law; rather, the Court reached its decision upon formulation of the appropriate standard of review. Writing for the Court, Justice O'Connor explained:

> [R]espect for a state court's findings of fact and application of its own law counsels against the sort

> of *de novo* review undertaken by the Court of Appeals in this case. . . . Where the issue is solely whether a state court has properly found existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." . . .
>
> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine . . . "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jeffers, 110 S. Ct. at 3102-03 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 450 (1980) (White, J., dissenting) and *Jackson v. Virginia*, 443 U.S. 307, 319, *reh'g denied*, 444 U.S. 890 (1979)) (emphasis in original).

In short, this court's focus must not be on the underlying sentence but on whether the *state system* in both imposing and reviewing that sentence committed an *independent* constitutional violation. To vacate Richmond's sentence, this court would have to find that there is no rational basis in law or fact for the state supreme court's final evaluation that the circumstances warrant the sentence of death:

> [A] federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: if a State's aggravating circumstances adequately perform their constitutional function, then the state court's application of those circumstances raises, apart from due process and eighth amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case — *including a de novo finding by an appellate court that a particular offense "is especially heinous . . . or depraved"* — is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 3103 (emphasis added).

We therefore reject Richmond's invitation to "conduct[ ] a *de novo*, case-by-case comparison of the facts" of various state court precedents. *Id.* at 3101. Like the Supreme Court in *Walton*, we "conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient." *Walton*, 110 S. Ct. at 3058. Applying *Jeffers*, we further conclude that under that definition a rational factfinder could indeed have found Crummett's murder heinous or depraved so as to warrant the penalty of death.

D

[9] Even if Richmond were to prevail in his claim that the Arizona Supreme Court failed to provide a sufficiently limiting construction for the aggravating circumstance discussed above, however, his contentions would still lack merit. The Arizona Supreme Court rested its affirmance of his sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. *See Richmond*, 136 Ariz. at 318-21, 666 P.2d at 63-

66. The second aggravating factor relied upon was Richmond's conviction for another murder six months after his initial conviction. Although this latter conviction postdated Richmond's first, "[i]t is not disputed that the killing that was the basis of th[at] conviction occurred prior to the murder of Bernard Crummett." *Richmond*, 640 F. Supp. at 780; *see supra* note 1. In any event, both convictions were duly on record by the time of Richmond's resentencing in 1980.

Furthermore, although the state supreme court explicitly found and addressed only these two aggravating circumstances, it held that "[t]he trial court correctly found three aggravating circumstances." *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. The third was an entirely separate prior conviction for kidnapping — statutorily relevant for death penalty purposes as an offense "involving the use or threat of violence on another person." Ariz. Rev. Stat. Ann. § 13-703(F)(2).[11] Arizona law explicitly provides that a single aggravating circumstance may suffice for imposition of the death penalty. *See* § 13-703(E).

Richmond does not contend, nor could he reasonably, that the statutory definitions of these two other factors are uncon-

[11] The court also hinted at the possible applicability of a fourth aggravating circumstance: the defendant's commission of the crime in expectation of pecuniary gain. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5); *Richmond*, 136 Ariz. at 320, 666 P.2d at 65. Although noting that the trial court had improperly analyzed this factor in reaching the conclusion that it did not apply, the Arizona Supreme Court declined to determine whether under a proper analysis it would apply.

With respect to consideration of Richmond's kidnapping conviction, the Arizona Supreme Court's majority opinion does not address it except to express general agreement with the trial court's reliance upon it. The concurrence, which was endorsed by two Justices, is somewhat more explicit in its embrace of the lower court's reliance on both the prior murder conviction *and* the prior kidnapping conviction. *See Richmond*, 136 Ariz. at 323-24, 666 P.2d at 68-69 (Cameron, J., concurring and Gordon, V.C.J., joining).

stitutionally vague. *See* § 13-703(F)(1)-(2). Rather, he sidesteps consideration of these additional factors by citing this circuit's en banc decision in *Adamson v. Ricketts* for the proposition that invalidation of any one aggravating circumstance requires resentencing. *See* 865 F.2d at 1037 n.42, 1038, 1039. We have just held that the aggravating circumstance to which Richmond refers is *not* invalid, but assuming for the sake of argument that it is, Richmond's reliance on *Adamson* is not well taken.

The Supreme Court granted certiorari in *Walton* specifically *because of* this circuit's en banc holding in *Adamson*,[12] and *Walton* reached the opposite conclusion regarding the Arizona statute's constitutionality. Even if the portion of *Adamson* upon which Richmond relies survives *Walton*, it still does not support his claim. Contrary to the suggestion, *Adamson* did not hold that invalidation of one aggravating circumstance automatically requires remand for resentencing; rather, the court simply noted that it is the common practice of the Arizona Supreme Court to remand for resentencing when *that court* invalidates an aggravating circumstance. *Id.* There is no suggestion in *Adamson* that the United States Constitution requires remand when one aggravating factor is eliminated from the analysis if sufficient other aggravating factors remain.

The Supreme Court's recent decision in *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), upon which Richmond also relies, is not to the contrary. In *Clemons*, a Mississippi inmate challenged the constitutionality of a death sentence imposed partially on the basis of a court's finding that it had been an

[12]*See Walton*, 110 S. Ct. at 3054 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, *see Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc), we granted certiorari."); *id.* at 3059 (Scalia, J., concurring) (describing *Adamson* and *Walton* as "essentially identical" cases).

"especially heinous, atrocious or cruel" killing. *Id.* at 1445. The Mississippi law in question permitted imposition of the death penalty upon a finding of only one aggravating circumstance so long as that aggravating circumstance outweighed all mitigating circumstances. Finding the state supreme court's consideration of the "especially heinous" factor impermissibly vague, the Supreme Court remanded for resentencing.

[10] The Court did not hold, however, that imposition of the death penalty on the basis of the single remaining aggravating factor would have been ipso facto unconstitutional. Rather, it implicitly recognized that reliance on a single aggravating factor *can* be constitutional. *See id.* at 1446, 1450-51. The Court remanded because once the vague factor was removed from the analysis, it was unclear from the Mississippi Supreme Court's opinion whether the one remaining circumstance still outweighed all the mitigating evidence. *See id.* at 1449-51 (Parts III-IV of the opinion).

[11] In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency*." Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require

resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

V

Richmond next contends that because the trial court never specifically found that he caused, intended to cause, or attempted to cause Crummett's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982). The defendant in *Enmund* had been convicted of felony murder and sentenced to death for his involvement in the killing of two robbery victims, even though the record only suggested that he was the driver of the get-away car. In vacating Enmund's sentence, the Supreme Court held that imposition of the death penalty violates the eighth and fourteenth amendments in the absence of a specific finding by the trier of fact that the defendant actually killed, attempted to kill, intended to kill, or contemplated that life would be taken:

> Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided

> and abetted a robbery in the course of which murder was committed.

Id. at 798; *see id.* at 801.

Enmund, however, is clearly distinguishable from the present case. The jury that convicted Richmond received instructions on both premeditated and felony murder, and the record before us clearly provides sufficient evidence for a finding that Richmond expressly intended to participate in and to facilitate that murder. Moreover, the Supreme Court's holding in *Enmund* was predicated upon the attenuated nature of the defendant's responsibility for the deaths in that case. As the Supreme Court pointed out more recently in *Tison v. Arizona*, 481 U.S. 137, *reh'g denied*, 482 U.S. 921 (1987), *Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all — the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
>
> • • • •

> . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.

481 U.S. at 157-58 (footnote omitted).

Furthermore, in its independent review of the record in this case, the Arizona Supreme Court explicitly did consider *Enmund*, and it set forth findings sufficient to satisfy both that test and the Supreme Court's later pronouncements in *Tison*:

> Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. . . . There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.
>
> The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony.

Richmond, 136 Ariz. at 318, 666 P.2d at 63.[13]

[12] Nor does it matter that the *Enmund* finding was made by the state supreme court rather than by the original sentencing court:

> At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. . . .
>
> . . . [W]hen a federal habeas court reviews a claim that the death penalty has been imposed on one who has neither killed, attempted to kill, nor intended that a killing take place or lethal force be used, the court's inquiry cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made.

Cabana v. Bullock, 474 U.S. 376, 386-87 (1986) (footnote omitted). Accordingly, we conclude that the Arizona courts have predicated Richmond's sentence upon a sufficient finding of criminal intent.

VI

[13] As a black male of moderate means, Richmond next contends that the district court erred in denying his request for

[13]Interestingly, the Arizona Supreme Court conducted its *Enmund* analysis in this case before the United States Supreme Court narrowed the *Enmund* holding in *Tison*. The United States Supreme Court decided *Enmund* in 1982; the Arizona Supreme Court affirmed Richmond's sentence in 1983; and the United States Supreme Court decided *Tison* in 1987.

an evidentiary hearing upon his claim that Arizona's administration of the death penalty is racially, sexually, and socio-economically discriminatory. We disagree. A habeas corpus petitioner is entitled to an evidentiary hearing both if he "alleges facts which, if proved, would entitle him to relief" and if he did not receive a full and fair evidentiary hearing on the issue in the state court. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see id.* at 312-19. The facts that Richmond has alleged, even if proven, would not entitle him to relief.

In support of his request for a hearing on this issue in the district court, Richmond made an extensive proffer of what he seeks to prove:

> The proffer included that, although 15% of the victims of homicides in Arizona since 1973 have been black, every person under death sentence was convicted of killing a white victim; that [although] approximately 10% of the persons convicted of homicide in Arizona since 1973 have been women, no women are on death row. All three experts who had examined the Arizona death sentencing process from 1973 to the present [March 1987] found significant discrepancies based on the victim's race; two found evidence of discrimination based on the defendant's race, and one demonstrated significant disparities based on sex and economic status as well.

Brief for Appellant at 38-39 (citations omitted). This proffered evidence, however, is precisely the sort of generalized statistical evidence that was rejected as unactionable by the Supreme Court in *McKleskey v. Kemp*, 481 U.S. 279, *reh'g denied*, 482 U.S. 920 (1987). Even if proven, the statistical disparities to which Richmond points would be insufficient to support an inference of purposeful discrimination in his own case. To require the district court to weigh this evidence would be to suggest that Richmond's death sentence could conceivably be invalidated solely on the basis of his physical

or social affinity to other defendants who are not now before this court but who may have suffered unconstitutional discrimination in their receipt of the same sentence. This we cannot do. To prevail in challenging his sentence under the equal protection clause, Richmond "must prove that the decision-makers in *his* case acted with discriminatory purpose." *McKleskey*, 481 U.S. at 292 (emphasis in original). Richmond has alleged no facts to suggest that either the Arizona Supreme Court, the state trial court, or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. The district court thus properly denied his request for an evidentiary hearing on this issue. *See generally id.* at 292-320.

VII

[14] Richmond's final contention is that fulfillment of his sentence after sixteen years on death row would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[14] We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.

On the other hand, the State of Arizona has directed the court's attention to two relevant, though not controlling, precedents. In a decision affirmed two years later by the Tenth Circuit, the United States District Court for the District of

[14]Richmond actually alleged that fulfillment of his sentence after *thirteen* years on death row would constitute cruel and unusual punishment. Because he raised that claim in his opening brief, which was filed in 1987, we have added the past three years during which we deferred submission of his appeal. We note, however, that because this appeal properly concerns Richmond's sentence only as of the date of its reimposition in 1980, the relevant period of his residency on death row is actually ten years.

Utah rejected a similar claim brought by a habeas corpus petitioner who had been on death row for ten years. *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*. 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919, *reh'g denied*, 485 U.S. 1015 (1988). The court reasoned that to accept the petitioner's argument would be "a mockery of justice" given that the delay was attributable more to the petitioner's actions than to the state's. *Id.* Like Richmond, the petitioner in *Andrews* had sought "extensive and repeated review of [his] death sentence." *Id.* Arizona also points to the well-known decision of the California Supreme Court in *People v. Chessman*, in which that court rejected the same claim by an eleven-year death-row inmate. 52 Cal. 2d 467, _, 341 P.2d 679, 699 (1959), *cert. denied*, 361 U.S. 925, *reh'g denied*, 361 U.S. 941 (1960). Finally, we note the decision of the United States Supreme Court in *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968), which the district court cited in its rejection of this claim and which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case. *See Richmond*, 640 F. Supp. at 803 (citing *Harrison*).

Especially in light of the relative absence of contrary precedents, we believe that the reasoning of these cases is sound. A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates — less successful in their attempts to delay — would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

VIII

For the foregoing reasons, we affirm the judgment of the district court and deny Richmond's petition for a writ of habeas corpus.

AFFIRMED.

HARRY PREGERSON, Circuit Judge, with whom JUDGES HUG, NORRIS and REINHARDT join, dissenting from denial of rehearing en banc:

By declining to rehear this case en banc, this court sends a man to his death without undertaking even the minimal review that the Supreme Court continues to find appropriate in habeas cases. In this case, even the most deferential review of the record reveals that no rational sentencer could have concluded that Richmond's mental state was "especially heinous," as that term is defined by the Arizona Supreme Court. The Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" turns on the assumption that he was driving the car when it ran over the victim. The identity of the driver, however, was the subject of a credibility dispute. Neither the jury nor the trial court resolved that dispute, and the Arizona Supreme Court is incapable of resolving it rationally.

Moreover, the panel maintains that any error in the finding of an aggravating circumstance is harmless because the sentencing judge concluded that the mitigating circumstances

were not sufficiently substantial to call for leniency. The panel's conclusion is based on the erroneous premise that Arizona law permitted the sentencing court to arrive at such a conclusion without weighing the aggravating factors against the mitigating circumstances. *See Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990). By maintaining that Arizona's statute is not a weighing statute, the panel's opinion directly conflicts with Arizona case law and the prior decisions of this court. That case law demonstrates that in Arizona, the sentencer evaluates whether the mitigating evidence is sufficiently substantial to warrant leniency by weighing it against the aggravating factors. When an invalid aggravating factor is removed from the scales, the equation can change. Someone must reevaluate the mix of mitigating factors in light of the reduced gravity of the remaining valid aggravating factors.

I

The panel's opinion acknowledges that the "especially heinous" aggravating circumstance is unconstitutionally vague on its face, but it concludes that the Arizona Supreme Court applied a sufficiently narrow construction of the facially vague term. Once a state appellate court has articulated a constitutionally sufficient narrowing construction of a facially vague aggravating circumstance, federal courts must still review the state courts' application of that narrowed definition to the facts of a particular case. That review is to be conducted under the deferential "rational factfinder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979). A state court's finding of an aggravating circumstance, including a state appellate court's finding that a murder is "especially heinous," violates the Constitution if no reasonable sentencer could have made the finding. *See Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-03 (1990).

In this case, no rational sentencer could have found that Richmond's mental state was "especially heinous" as that facially vague term has been narrowed by the Arizona

Supreme Court. The limiting definition, as reported in the panel's opinion, requires that the sentencer make a factual finding about the defendant's mental state. "Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions." *State v. Richmond*, 666 P.2d 57, 64 (Ariz. 1983), *quoted in Richmond v. Lewis*, 921 F.2d 933, 943 (9th Cir. 1990). In addition, the Arizona Supreme Court tells us that "heinous" means "grossly bad" or "shockingly evil." The Arizona Supreme Court applies several factors to determine whether the "especially heinous" aggravating circumstance applies. In determining in this case that Richmond's mental state was grossly bad or shockingly evil, the Arizona Supreme Court mentioned only two of those factors: the infliction of gratuitous violence on the victim and the mutilation of the corpse. I believe that by focusing solely on those two factors in this case, the Arizona Supreme Court could draw rational inferences about the mental state of only one actor: the driver of the car:

> Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found.

Id., quoted in *Richmond*, 921 F.2d at 943.

As this quotation demonstrates, the Arizona Supreme Court clearly focused on the actions of the driver when it determined that the facts warranted a finding that the killer's mental state was "especially heinous." The Arizona Supreme Court appeared to assume that Richmond was the driver. Yet

neither the jury nor the sentencing court ever found that Richmond was the driver.

Indeed, the driver's identity has been vigorously disputed throughout this case. Faith Erwin provided the only testimony implicating Richmond as the fatal driver.[1] Richmond has always denied being the fatal driver, and he has witnesses to support him. In his statement to the police, Richmond said that Becky Corella backed the car up over the victim, then drove forward and ran over him again. *Richmond v. Ricketts*, 640 F. Supp. 767, 771 (D. Ariz. 1986). Corella did not testify.[2] A witness for Richmond testified that Erwin earlier reported that Corella had been driving. 640 F. Supp. at 778. The jury did not determine who drove the car. Because the jury was instructed on felony murder, the jury's verdict is consistent with either version.

At the sentencing hearing, Richmond submitted additional evidence to show that Corella was the lethal driver. 640 F. Supp. at 778-79. According to affidavits signed by two witnesses, Corella admitted being the driver. Moreover, an affidavit signed by the prosecutor in the original trial stated that Corella was prepared to testify "and accept blame for the killing." *Id.*[3]

Neither the jury, the sentencing court, nor the Arizona Supreme Court has expressly resolved the dispute over who drove the car over the victim's body. Yet the Arizona Supreme Court's conclusion that Richmond's mental state

[1]Erwin received immunity in return for her testimony. *Richmond v. Ricketts*, 640 F. Supp. 767, 792 n.30 (D. Ariz. 1986).

[2]Corella was granted immunity, but neither the prosecution nor the defense called her as a witness. *State v. Richmond*, 560 P.2d 41, 44 (Ariz. 1976).

[3]In discussing the procedural history of the case, the panel's opinion mentions that Richmond filed one of these affidavits in a petition for post-conviction relief. 921 F.2d at 936. It does not discuss the other affidavits.

was "especially heinous" turns on the tacit assumption that he was the driver.

Just as the jury's verdict did not necessarily determine that Richmond was the driver, the trial court's finding that the murder was "especially cruel or heinous" did not turn on any finding that Richmond was the driver. Nor did it turn on any conclusion about Richmond's mental state. At the time Richmond was sentenced in 1980, the Arizona Supreme Court had not yet narrowed the definition of "especially heinous" to restrict the application of that aggravating circumstance to determinations of the defendant's mental state or attitude. The sentencing court did not explain why it concluded that the aggravating circumstance applied, nor did it assume that Richmond was driving the car when the victim was run over. The findings and special verdict of the sentencing court do not even discuss the identity of the driver.

Nevertheless, the identity of the driver was an issue on appeal to the Arizona Supreme Court. While Richmond's case was on appeal, the United States Supreme Court decided *Edmund v. Florida*, 458 U.S. 782 (1982), which held that the Constitution forbids capital punishment for certain types of felony murder convictions. In *Edmund*, the Court determined that states cannot execute defendants convicted of felony murder unless they actually killed, attempted to kill, or intended that a killing occur. *See Cabana v. Bullock*, 474 U.S. 376, 378 (1986). Richmond contended that the ruling of *Edmund* should spare him from execution.

The Arizona Supreme Court's discussion of the *Edmund* argument is the only section of the state supreme court opinion that discusses the dispute over the driver's identity. As I read the opinion of the state supreme court, it determined that Richmond's *Edmund* argument was a loser no matter who drove the car. Even under Richmond's version of the facts, the court noted, Richmond's level of involvement in the crime was substantial enough that it satisfied *Edmund*, without

regard to whether Richmond was responsible for the final lethal action. *See State v. Richmond*, 666 P.2d at 63.

Although the Arizona Supreme Court discussed the dispute over the identity of the driver, the Arizona courts resolved the *Edmund* question without determining whether or not Richmond drove the car. The Arizona Supreme Court was institutionally incapable of resolving the credibility dispute over the identity of the driver. *See Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986). Conceivably, the Arizona Supreme Court could have determined that the sentencing court actually made an *Edmund* finding, and could have further determined that such a finding was supported by the evidence. The record, however, shows that the sentencing court made no *Edmund* finding, nor did it determine whether Richmond or Corella drove the car over the victim.* The opinion of the panel confirms that it was the state supreme court, not the sentencing court, that resolved the *Edmund* question. *See Richmond* 921 F.2d at 948 ("Nor does it matter that the *Edmund* finding was made by the state supreme court rather than by the original sentencing court").

In sum, although the sentencing court may have been capable of resolving the dispute over the identity of the driver, it did not do so. The factfinder in this case can only be the Arizona Supreme Court. Yet the Arizona Supreme Court could

*The opinion of the Arizona Supreme Court includes one sentence that suggests that the sentencing court resolved the credibility conflict and made a factual finding that Richmond drove the car. The court said that "the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim." *State v. Richmond*, 666 P.2d 57, 63 (Ariz. 1983). This sentence suggests that the Arizona Supreme Court believed that the trial court made a finding about the driver's identity. If so, then the court was mistaken. There is simply nothing in the record to suggest that the trial judge made *any* conclusion about whether Richmond or Corella drove the car. If any state court can be said to have determined the identity of the driver, it is the Arizona Supreme Court, not the sentencing court. Yet the Arizona Supreme Court could not rationally determine whether it was Richmond or Erwin who was telling the truth.

not rationally resolve this factual dispute on the basis of a cold record. *See Cabana*, 474 U.S. at 388 n.5. Nevertheless, the Arizona Supreme Court's conclusion that Richmond's mental state was "especially heinous" depends on the assumption that Richmond, not Corella, deliberately drove the car over the victim's body. Applying the deferential standard articulated by the Supreme Court, I do not see how, under these circumstances, any rational factfinder could conclude that the "especially heinous" aggravating circumstance, as narrowed and defined by the Arizona Supreme Court, applied in this case.

II

Richmond was sentenced to death on the basis of three aggravating factors. Because Richmond does not challenge the application of two of those aggravating factors, the panel asserts in part IV.D. of its opinion that any error in applying the "especially heinous" aggravating circumstance is harmless. I strongly disagree. In Richmond's case, the trial court arrived at a verdict of death only after weighing the mitigating evidence against the aggravating factors. Because the ultimate sentencing determination in Arizona involves a balancing of the mitigating evidence against the aggravating factors, Arizona is a "weighing" state, as the Supreme Court used that term in *Clemons v. Mississippi*, 110 S. Ct. 1441, 1446, 1450 (1990). If the sentencing court's balancing included a constitutionally invalid aggravating factor, the fact that the scales also contained a valid aggravating factor does not, as the panel believes, dispose of Richmond's claim. In weighing states, the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), forbids such an "automatic rule of affirmance," because "it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 110 S. Ct. at 1450. There must either be a resentencing, *see Creech v. Arave*, 928 F.2d 1481, 1489 (9th Cir. 1991); *Adamson v. Ricketts*, 865 F.2d 1011, 1038-39 (9th Cir. 1988) (en banc),

or at a minimum, the Arizona courts must reweigh the defendant's mitigating evidence against the valid aggravating factors.

In expounding its view that any error in the finding of the "especially heinous" aggravating circumstance was harmless, the panel begins with the erroneous premise, which it advances without citing any case law, that Arizona is not a weighing state. *See Richmond*, 921 F.2d at 947. That premise is simply wrong. The language of the Arizona statute, as well as the cases of this court and the Arizona Supreme Court, establish that Arizona is indeed a weighing state.

It appears that the panel misreads Arizona law simply because the statute's text does not include the word "weigh." Nevertheless, it is clear that the statute requires weighing. If the trial court finds any aggravating circumstances, it must then make findings on the existence of mitigating circumstances. It is only after the trial court has made findings on the existence of both that it must make the sentencing decision. The statute requires a sentence of death if there are any aggravating circumstances "and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. § 13-703(E).

Without citing any authority, the panel mistakenly concludes that the aggravating circumstances do not influence the Arizona sentencer's inquiry into whether the mitigating circumstances are sufficiently substantial. 921 F.2d at 947. On the contrary, it is clear that the trial judge determines whether the mitigating circumstances are "sufficiently substantial" by evaluating them in relation to the aggravating circumstances that exist. This is a balancing, a process of weighing.

Numerous cases of the Arizona Supreme Court confirm that the sentencer determines whether mitigating evidence is "sufficiently substantial" by weighing it against aggravating circumstances. *See, e.g., State v. Rossi*, 706 P.2d 371, 379

(Ariz. 1985) ("Once the trial judge finds that defendant's capacity was significantly impaired . . . a mitigating factor arises which is then weighed against any aggravating circumstances that the trial judge may find to determine whether mitigating factors are sufficiently substantial to call for leniency"); *State v. Harding*, 670 P.2d 383, 397 (Ariz. 1983) ("We have described the formula of 'sufficiently substantial to call for leniency' as involving the weighing of aggravating against mitigating circumstances on the basis of the gravity of each circumstance."); *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983) (determining whether mitigating circumstances are sufficiently substantial involves weighing and balancing of aggravating and mitigating circumstances that are present). The Arizona Supreme Court has clearly explained that determining whether mitigating circumstances exist is distinct from the final balancing test:

> [T]he trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors .... It must also determine whether the defendant has shown mitigating circumstances .... After the trial court has made these findings of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency.

State v. Leslie, 708 P.2d 719, 730 (Ariz. 1985), *quoted in Adamson v. Ricketts*, 865 F.2d 1011, 1063 (9th Cir. 1988) (en banc) (Brunetti, J., dissenting). The Arizona case law thus confirms that the panel in this case has misconstrued the operation of the Arizona statute.

The panel has not simply misinterpreted Arizona law; it has also overlooked our prior cases. Although some portions of our opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), have not survived as good law, our description of the Arizona statute remains valid. We explained that after the parties have established the existence of aggravating

and mitigating circumstances, "the court must weigh the aggravating circumstance(s) against the mitigating circumstance(s)." *Id.* at 1040; *see also id.* at 1065-66 (Brunetti, J., dissenting). In *Adamson*, the State of Arizona itself acknowledged that the statute requires the sentencer to balance. *See id.* at 1043.[5]

In Richmond's case, the trial court found that there were a number of mitigating circumstances. *See State v. Richmond*, 666 P.2d 57, 65 (Ariz. 1983). It was only by comparing them to the aggravating circumstances that the sentencer concluded that they were not sufficiently substantial to warrant leniency. If a reviewing court's analysis reduces the number of valid aggravating circumstances, it reduces the weight and gravity of the aggravating factors that the sentencer may permissibly consider. The reviewing court can no longer rely on an earlier finding that the mitigating circumstances were not sufficiently substantial to call for leniency. A new balancing must be conducted in order to determine whether the mitigating circumstances are sufficiently substantial in relation to the remaining valid aggravating factors.

The panel fails to recognize that the findings of no mitigating circumstances sufficiently substantial to call for leniency is simply the end result of the balancing or weighing that the Arizona statute requires. It is not an isolated finding of fact. It depends on the nature and gravity of the aggravating circumstances. If the sentencing court weighed the mitigating circumstances against both valid and invalid aggravating circumstances, then the sentence of death cannot stand. At a minimum, there would have to be a determination whether the

[5]The panel's opinion also conflicts with our previous reading of the virtually identical language of Montana's capital sentencing statute. In Montana, as well as Arizona, the sentencer determines whether mitigating evidence is sufficiently substantial to warrant leniency by viewing it in relation to the aggravating circumstances that have been established. *See Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990).

mitigating circumstances, when weighed against the remaining valid aggravating circumstances, were sufficiently substantial to call for leniency.

III

Because no rational sentencer could have found that the "especially heinous" aggravating factor applied, Richmond is entitled to further proceedings in the state courts. Richmond presented a considerable amount of mitigating evidence at his sentencing hearing. Indeed, one justice of the Arizona Supreme Court would have reversed the sentence of death on the strength of the mitigating evidence. *See Richmond*, 666 P.2d at 69 (Feldman, J., dissenting). Richmond is entitled to have the Arizona courts reevaluate the strength of that mitigating evidence in relation to the valid aggravating factors, with the invalid "especially heinous" factor removed from the scales.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE LEE RICHMOND, *Petitioner-Appellant,* v. SAMUEL A. LEWIS,* Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison, *Respondents-Appellees.*	No. 86-2382 D.C. No. CV-84-010-T-ACM ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Alfredo C. Marquez, District Judge, Presiding

Argued and Submitted September 18, 1987
Submission Vacated September 22, 1987
Reargued and Submitted September 27, 1990
San Francisco, California

Filed December 26, 1990
Amended October 17, 1991

Before: Arthur L. Alarcon and Diarmuid F. O'Scannlain,
Circuit Judges, and Albert Lee Stephens,** District Judge.

Opinion by Judge O'Scannlain; Dissent by Judge Pregerson,
with whom Judges Hug, Norris and Reinhardt join.

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*Samuel A. Lewis and Roger Crist have been substituted for their respective predecessors in office, James R. Ricketts and Donald Wawrzaszek, pursuant to Federal Rule of Appellate Procedure 43(c)(1).

**The Honorable Albert Lee Stephens, United States District Judge for the Central District of California, sitting by designation.

the Arizona courts predicated Richmond's sentence upon a sufficient finding of criminal intent. **[13]** The court also disagreed that Arizona's administration of the death penalty was racially, sexually, and socio-economically discriminatory. The facts that Richmond alleged in support of this contention, even if proven, did not entitle him to relief. **[14]** The court rejected Richmond's final contention that fulfillment of his sentence after sixteen years on death row was cruel and unusual punishment. The court knew of no decision, and Richmond cited none, that the accumulation of time a defendant spends on death row during the prosecution of his appeals could accrue into an independent constitutional violation.

COUNSEL

Timothy K. Ford, MacDonald, Hoague & Bayless, Seattle, Washington, for the petitioner-appellant.

Jack Roberts, Assistant Attorney General, Phoenix, Arizona, for the respondents-appellees.

ORDER

The opinion reported at 921 F.2d 933 (9th Cir. 1990) is hereby amended as follows: in the block quotation in the second column on page 943 of the opinion, twenty-two lines from the bottom of the page, delete the ellipsis and insert in lieu thereof: "In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim."

The final paragraph in Part IV-D on page 947 of the opinion is hereby amended to read as follows:

In this case, there is no similar doubt. Elimination of the challenged factor would still leave enough support for Richmond's sentence because the statute at issue here is fundamentally different from the statute at issue in *Clemons*. The Mississippi law that *Clemons* considered authorizes the death penalty if " 'there are insufficient mitigating circumstances . . . to *outweigh* the aggravating circumstances.' " *Id.* at 1446 n.2 (quoting Miss. Code Ann. § 99-19-101(3)(c) (Supp. 1989)) (emphasis added). Arizona's law mandates the death penalty "if the court finds *one or more* of the [enumerated] aggravating circumstances . . . *and* that there are no mitigating circumstances *sufficiently substantial to call for leniency.*" Ariz. Rev. Stat. Ann. § 13-703(E) (emphasis added). The difference is significant: a conclusion by the Arizona courts that there are no substantial mitigating circumstances is separate from and independent of any conclusion regarding the existence of aggravating circumstances. Invalidation of an aggravating circumstance does not mandate reweighing or require resentencing where the court has found that the prosecution has met its burden of establishing aggravation sufficient to warrant the state's harshest penalty *two or three times* and that the defense has failed to establish mitigating circumstances sufficiently substantial to call for leniency. *See id.* §§ 13-703(C), (E). Under the statute at issue in *Clemons*, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation "weightier" or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here. Nothing in the Arizona statute suggests the need for plenary reweighing where the record still reveals that there are "one or more of the [enumerated] aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* § 13-703(E).

The panel has voted to deny the petition for rehearing. Judges Alarcon and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Stephens so recommends.

On the request of a judge in regular active service, the suggestion for rehearing en banc was put to a vote of the full court, and the majority of the court voted to deny rehearing. Fed. R. App. P. 35(b). Judge Pregerson dissented from the denial of rehearing and was joined by Judges Hug and Reinhardt. The dissent is filed as an attachment to this order.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

APPENDIX C

victed of murder, to death, and defendant appealed. The Supreme Court, Holohan, C.J., held that: (1) information charging defendant with first-degree murder gave adequate notice of charges against him; (2) right to speedy trial did not apply to sentencing; (3) defendant was not prejudiced by six-year delay in sentencing; (4) defendant failed to show that sentencing judge entertained actual bias or prejudice against him; (5) evidence was sufficient to support finding that defendant intentionally killed victim; (6) trial court properly considered prior murder conviction to be aggravating circumstance; (7) trial court properly considered evidence of defendant's good character as mitigating circumstance, but found it unpersuasive; (8) mitigation offered by defendant was not sufficiently substantial to outweigh aggravating circumstances warranting imposition of death penalty; (9) death penalty was not excessive or disproportionate to penalty imposed in similar cases; and (10) death penalty statute, on its face and in application, is constitutional.

Affirmed.

Cameron, J., specially concurred with opinion in which Gordon, V.C.J., concurred.

Feldman, J., dissented with opinion.

136 Ariz. 312

STATE of Arizona, Appellee,

v.

Willie Lee RICHMOND, Appellant.

No. 2914.

Supreme Court of Arizona,
En Banc.

May 12, 1983.

Rehearing Denied June 28, 1983.

After remand for resentencing, 114 Ariz. 186, 560 P.2d 41, the Superior Court, Pima County, Cause No. A-24252, Richard N. Roylston, J., sentenced defendant, con-

1. Constitutional Law ⇐265

Due process requires that defendant be advised of specific charges against him; however, there is no requirement that defendant be advised in indictment or information of statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in event of conviction. U.S.C.A. Const.Amend. 14.

2. Indictment and Information ⇐71.4(5)

Information charging first-degree murder gave defendant adequate notice of charges against him, and thus satisfied Sixth Amendment right to know nature and cause of accusation. U.S.C.A. Const.

Amend. 6; A.R.S. §§ 13–451 to 13–453 (Repealed).

3. Criminal Law ⇐996(2)

Six-year delay in resentencing of defendant did not deprive defendant of constitutional right to speedy trial, in that right to speedy trial does not extend to sentencing. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐1177

Defendant was not prejudiced by six-year delay in resentencing where such delay resulted in defendant having opportunity to present additional evidence as negation of sentence, and sentence he received at resentencing was no harsher than original sentence.

5. Constitutional Law ⇐70.1(10), 203, 270(1)
Criminal Law ⇐189

Resentencing of defendant was not violation of ex post facto prohibitions, double jeopardy prohibitions, nor of due process and separation of powers requirements. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Amends. 5, 14.

6. Jury ⇐24

Trial court's resentencing of defendant did not deny defendant his alleged constitutional right to have jury decide presence of aggravating or mitigating circumstances.

7. Constitutional Law ⇐270(1)

Once defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring defendant to establish mitigating circumstances, as facts which would tend to show mitigation are peculiarly within knowledge of defendant. U.S.C.A. Const.Amend. 14.

8. Judges ⇐47(2)

A litigant is entitled to impartial judge at any stage of proceedings; however, this does not include a judge totally ignorant of previous proceedings.

9. Constitutional Law ⇐270(1)
Criminal Law ⇐1165(1)

Where defendant who was resentenced presented no evidence that sentencing judge entertained actual bias or prejudice against him, defendant failed to show prejudice or deprivation of due process. U.S.C.A. Const.Amend. 14.

10. Criminal Law ⇐1134(8)

In each case where death penalty is imposed, Supreme Court will conduct independent review of record to assure just result.

11. Homicide ⇐230

In first-degree murder prosecution, evidence that defendant played integral parts in events which caused victim's death, willingly assisted in acts which were intended to cause victim's death, and that he drove vehicle that was used to kill victim was sufficient to support finding that defendant intended to take a life. A.R.S. §§ 13–451 to 13–453 (Repealed).

12. Homicide ⇐354

In sentencing defendant convicted of murder, trial court did not err in finding prior murder conviction to be aggravating circumstance, even though defendant was convicted of prior murder subsequent to conviction in instant case. A.R.S. § 13–703, subd. F, par. 1.

13. Criminal Law ⇐1208(6)

For purposes of applying statute making commission of offense in especially heinous, cruel or depraved manner an aggravating circumstance, in first-degree murder prosecution, "cruelty" involves victim's pain or suffering before death. A.R.S. § 13–703, subd. F, par. 6; §§ 13–451 to 13–453 (Repealed).

See publication Words and Phrases for other judicial constructions and definitions.

14. Homicide ⇐354

In first-degree murder prosecution, there was no evidence to indicate that victim suffered more pain than that of initial blow which rendered him unconscious, and thus, offense was not committed in cruel manner, for purposes of statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13–703, subd. F, par. 6; §§ 13–451 to 13–453 (Repealed).

15. **Homicide** ⇐354

As used in statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner, "heinous" and "depraved" involve mental state and attitude of offender as reflected in his words and actions; factors to be considered include infliction of gratuitous violence on victim, and needless mutilation of victim. A.R.S. § 13–703, subd. F, par. 6.

See publication Words and Phrases for other judicial constructions and definitions.

16. **Criminal Law** ⇐1208(6)

Presence of any one of elements of cruelty, heinousness, or depravity is sufficient to constitute aggravating circumstance under statute making it aggravating circumstance to commit offense in especially heinous, cruel or depraved manner. A.R.S. § 13–703, subd. F, par. 6.

17. **Homicide** ⇐354

In resentencing defendant, convicted of first-degree murder, trial court did not err in failing to find his improved conduct and character to be mitigating circumstance; though it would have been arbitrary decision had court refused to consider the evidence, it was sufficient that court did consider the evidence but found it unpersuasive. A.R.S. §§ 13–451 to 13–453 (Repealed).

18. **Criminal Law** ⇐1134(8)

In death penalty cases, Supreme Court will conduct independent examination of record to determine for itself the presence or absence of aggravating and mitigating circumstances and weight to give to each, and will independently determine propriety of the sentence. A.R.S. § 13–703.

19. **Homicide** ⇐354

In resentencing defendant, convicted of first-degree murder, trial court correctly found aggravating circumstances that defendant had been convicted of offense, murder, for which life imprisonment or death was imposable, that defendant had been convicted of felony involving use or threat of violence, and that offense was committed in especially heinous manner. A.R.S. § 13–703, subd. F, pars. 1, 2, 6.

20. **Homicide** ⇐354

Evidence supported trial court's finding that character of defendant, convicted of first-degree murder, had not changed between time of conviction and resentencing, and thus, such was not mitigating factor sufficient to outweigh aggravating circumstances warranting death sentence. A.R.S. §§ 13–451 to 13–453 (Repealed).

21. **Homicide** ⇐354

In first-degree murder prosecution, imposition of death penalty was not disproportionate to penalty imposed in similar cases, in which defendants robbed and murdered their victims. A.R.S. §§ 13–451 to 13–453 (Repealed).

22. **Criminal Law** ⇐1213
Homicide ⇐351

Death penalty statute, on its face and in application, does not allow for arbitrary and capricious determinations, and is thus not violative of Eighth Amendment. A.R.S. § 13–703; U.S.C.A. Const.Amend. 8.

23. **Criminal Law** ⇐1208(1)

Neither Federal Constitution nor Arizona Supreme Court require that imposition of death penalty precisely reflect composition of general population.

24. **Criminal Law** ⇐1208(6)

Before one is subject to death penalty, state must charge him and prove him guilty beyond reasonable doubt, and must prove aggravating circumstances beyond reasonable doubt.

25. **Criminal Law** ⇐1134(8), 1208(6)

When death penalty is imposed, trial court may find mitigating factors substantial enough to call for leniency, and Supreme Court will then conduct independent review of all matters of aggravation and mitigation to determine if death sentence was properly imposed, and will conduct proportionality review in every case to assure penalty is not excessive nor disproportionate to sentences imposed in similar cases; such safeguards are blind to color, wealth or sex of defendant.

Specially Concurring Opinion

26. **Homicide** ⇐354

Although murder victim was run over twice and his skull crushed, and although the victim's appearance was "ghastly", the offense was not especially heinous and depraved, as regarded the propriety of imposing death penalty, where there was no showing that defendant inflicted any violence on victim which he must have known was beyond the point necessary to kill, and where there was no suggestion of distinct acts, apart from the killing, specifically performed to mutilate victim's body. A.R.S. § 13–703, subd. F, par. 6.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, and Jack Roberts, Asst. Atty. Gen., Phoenix, for appellee.

Richard S. Oseran, Former Pima County Public Defender, Frederic J. Dardis, Pima County Public Defender by Allen G. Minker, Tucson, for appellant.

HOLOHAN, Chief Justice.

Appellant, Willie Lee Richmond, was found guilty of first degree murder on February 5, 1974, and was sentenced to death. This court affirmed the conviction and the sentence in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). However, we later vacated the death sentence pursuant to *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979), and remanded for resentencing.

After a sentencing hearing, appellant again was sentenced to death, from which sentence he now appeals. Additionally, appellant asks that we review the denial of his petition for post-conviction relief. We have jurisdiction pursuant to A.R.S. § 13–4031 and Rule 32.9, Arizona Rules of Criminal Procedure, 17 A.R.S.

The conviction arose from a 1973 incident where appellant and his 15-year-old girlfriend, Faith Erwin, accompanied Becky Corella and Bernard Crummett to a Tucson motel. Becky had arranged to perform an act of prostitution with Crummett. Becky informed appellant that Crummett was "loaded." Appellant decided to rob Crummett.

Appellant accompanied by the two women and Crummett drove to a deserted area outside Tucson ostensibly for Crummett to engage in another act of prostitution with Becky. Appellant stopped the car feigning a flat tire. Appellant alighted from the car and went to the passenger side where he pulled Crummett from the car. Appellant knocked Crummett to the ground, and, as Crummett lay on the ground, appellant hit him with several large rocks, causing Crummett to lose consciousness. Becky took the victim's watch and wallet from his pockets. Appellant and the two women left Crummett lying unconscious on the ground, but, before leaving, the vehicle was twice driven over him.

Medical testimony revealed that Crummett died of a compressive injury to the skull consistent with the excessive force of a wheel of a car. At trial Faith Erwin testified that appellant was the driver of the automobile when it was driven over the victim. Appellant claimed that Becky Corella was the driver.

NOTICE

[1, 2] Appellant claims a violation of his sixth amendment right to know the nature and cause of the accusation against him because the information did not put him on notice that he could receive the death penalty, nor did it state what aggravating factors would be presented. Appellant did not raise this issue at the time he appealed his conviction, but, as we are required, pursuant to A.R.S. § 13–4035, to search the record for fundamental error, we will address this issue. Appellant was charged with first degree murder in violation of A.R.S. § 13–451, § 13–452 and § 13–453.[1] At that time § 13–453 provided that "a person

1. These are section numbers under the old criminal code, they have since been renumbered or repealed.

guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life." In *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982), we addressed the issue raised by appellant, and we held that an indictment charging first degree murder was sufficient on its face to inform the defendant of the crimes charged and the sentences which could be imposed. Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

SPEEDY TRIAL

[3] Appellant was first sentenced to death in February of 1974. He was resentenced to death in 1980. Now appellant claims he was denied his right to a fair and speedy sentencing, and that he was prejudiced by the six-year gap which deprived him of the ability to effectively present his case for mitigation. We addressed this issue in *State v. Blazak, supra*, where we stated, "[n]either this court nor the United States Supreme Court has found that the right to a speedy trial extends to sentencing." 131 Ariz. at 600, 643 P.2d at 696, citing *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475 (1980).

[4] The delay resulted in the appellant having an opportunity to present additional evidence as mitigation. Additionally appellant has failed to show how he was prejudiced. He was afforded the opportunity to present his original mitigating evidence as well as any additional mitigating factors which may have been omitted in the first sentencing hearing or which have arisen since that hearing. The sentence he received at his resentencing was no harsher than the original sentence. We are unable to find any prejudice resulting from the delay.

RESENTENCING UNDER WATSON

[5] On numerous occasions this court has heard and rejected arguments that resentencing under *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied* 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) is unconstitutional. Appellant asserts several grounds for this argument claiming the resentencing is: (1) a violation of ex post facto prohibitions; (2) a violation of double jeopardy prohibitions; and (3) a violation of the due process and separation of powers requirements because it is a judicially created penalty. We have addressed these issues many times before with resolutions adverse to appellant. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982); *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). These arguments have also been considered and rejected by the Ninth Circuit Court of Appeals in *Knapp v. Cardwell*, 667 F.2d 1253, *cert. denied*, —— U.S. ——, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

SENTENCING CHALLENGES

[6, 7] The sentencing procedure is contested by appellant on three other grounds. First, that he was denied his alleged constitutional right to have a jury decide the presence of aggravating or mitigating circumstances. We have previously rejected this argument. *State v. Gretzler, supra; State v. Blazak, supra; State v. Watson, supra.* Second, appellant contends it is unconstitutional to place the burden of proof of mitigating circumstances on the defendant. Once the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances. As we stated in *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980), "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant."

Third, appellant claims he was denied his right to be sentenced by an impartial trier of fact. This contention is based on evidence which was introduced at the original sentencing. At the first sentencing hearing, defense counsel presented psychiatric testimony which classified appellant as a sociopath or psychopath. This condition was described as one who never learns from experience, has poor impulse control, has a lack of moral insight and shows very little guilt. The psychiatrists characterized appellant as callous, grossly selfish, irresponsible and impulsive. This testimony was introduced as mitigation.

Under the Arizona death penalty statute in effect at the time, the judge could consider *only* four enumerated factors as mitigation. One of the statutory mitigating circumstances was that "the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."[2] The psychiatric testimony was intended to show the existence of this particular mitigating factor. The judge did not find this factor to exist.

Five years later, when this court ordered a resentencing, the case was returned to the original trial judge. Appellant's request for a change of judge was denied by the presiding judge.[3] At the time of the resentencing, the Arizona death penalty statute, A.R.S. § 13-703, required that the judge who heard the case also conduct the sentencing. *State v. McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980). The statute has recently been amended to allow a judge other than the trial judge to conduct the sentencing hearing if the trial judge has died, resigned, or become incapacitated or disqualified.

[8, 9] A litigant is entitled to an impartial judge at any stage of the proceedings. *See, State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App.1978). However this does not include a judge totally ignorant of the previous proceedings. Any judge who might have conducted the resentencing in this case would have before him the record of the trial and the original sentencing hearing. Appellant presents no evidence that the sentencing judge entertained actual bias or prejudice against him. We stated in *State v. Greenawalt*, 128 Ariz. 150, 168, 624 P.2d 828, 846 *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981), "evidence is not inadmissible simply because it paints a black picture of the defendant's character or his bent for evil." Without some specific showing of bias on the part of the sentencing judge, we cannot say appellant was prejudiced or deprived of due process. From time to time appellate courts send cases back to a trial court for resentencing. The fact of resentencing is not sufficient, standing alone, to infer bias or prejudice.

The psychiatric evidence of the first mitigation hearing was not used in the second hearing, and there was no reference to that evidence in the second hearing.

[10] Additionally, in each case where the death penalty is imposed, this court conducts an independent review of the record to assure a just result. We have reviewed the record in the instant case, and find no evidence of prejudice exhibited by the sentencing judge.

FELONY MURDER AND THE DEATH PENALTY

The jury which convicted appellant was instructed on both theories of first degree murder—premeditation and felony murder. The jury returned a verdict of first degree murder. There is no indication in the record whether the jury's verdict was based on premeditation or felony murder.

The appellant contends that under the state of the record in this case the penalty of death cannot be imposed. The United States Supreme Court recently discussed the issue of felony murder in *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The Court observed:

2. Former A.R.S. § 13-454(F)(1), renumbered as A.R.S. § 13-703(G)(1).

3. The motion was denied because it was not timely made. We will, however, examine this contention for fundamental error.

Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which a murder was committed.

Id. at ——, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152. The Court concluded that death was not a valid penalty for one who neither took life, attempted to take life, nor intended to take life.

[11] By comparison, in the instant case appellant was an active participant. Appellant admitted he planned the robbery, drove the victim into the desert and knocked the victim unconscious to rob him. Faith Erwin testified that appellant threw rocks at the victim after he knocked him to the ground. Bloody rocks were found at the scene. The medical examiner testified that there were two kinds of force applied to the victim's skull—one which was consistent with the automobile tire and another in which there was external application of a pointed object. There is, however, no evidence that the latter force alone would have killed the victim.

Even if we accept appellant's contention that he was not driving the car when the victim was run over, we do not believe this case falls within the parameters of *Enmund*. The facts from the appellant's version indicate that he was the leader of the group; he was the first to use violent force on the victim; he was aware that the victim, if allowed to live, could identify him. Appellant, from his version of the facts, was willing to leave the wounded and unconscious victim alone in the desert to an uncertain fate. Appellant contends that Becky Corella was the one who drove the car over the victim. There is no evidence that appellant protested or showed any emotion when the victim was twice run over. The appellant's version of the facts indicates appellant played an integral part in the events which caused the victim's death, and he willingly assisted in the acts which were intended to cause the victim's death.

The evidence presented by the state was that the appellant drove the vehicle over the victim, thus killing him. The testimony of Faith Erwin was that the appellant was the driver at the time the victim was run over. The circumstantial evidence supports Faith's testimony. The circumstances show that appellant was the driver when the group left for the desert. The other woman, Becky Corella, was so short in stature that it was difficult for her to operate an automobile. Appellant was the leader of the group and directed the operation. With such support we believe the trial judge was justified in concluding that appellant drove the vehicle that was used to kill the victim.

Under either version of the facts appellant does not fit within the sphere of defendants the *Enmund* court seeks to protect from capital considerations. The evidence in this case shows that appellant intended to take a life.

PRIOR CONVICTION

Appellant was convicted in the instant case on February 5, 1974. He was convicted of another murder on August 9, 1974, even though that murder had occurred before the murder in the instant case. At the resentencing in 1980 the State sought to use this later conviction as an aggravating factor. Appellant argues this was improper.

A.R.S. § 13–703(F) enumerates aggravating circumstances which should be considered in determining the imposition of the death penalty. A.R.S. § 13–703(F)(1) states that "the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." Citing *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982), appellant contends the trial court erred in finding this aggravating circumstance.

In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), this court stated:

> Convictions entered prior to a sentencing hearing may thus be considered regardless of the order in which the underlying crimes occurred, *State v. Jordan*, [*supra*,] or the order in which the convictions were entered. [*State v. Valencia*, 124 Ariz. at 139, 602 P.2d at 807, 809 (1979)].
>
> Any language suggesting the contrary in *State v. Ortiz, supra*, [131 Ariz. at 210–11, 639 P.2d at 1035–36] is hereby disapproved. In *Ortiz*, we found the trial court erred in considering a contemporaneous conviction for conspiracy to commit murder as aggravation for the murder. This exclusion from consideration is best understood as having been required because both convictions arose out of the same set of events.

135 Ariz. at 57, n. 2, 659 P.2d at 16, n. 2.

[12] In light of the language in *Gretzler*, the trial court did not err in finding the prior murder conviction to be an aggravating circumstance.

CRUEL AND HEINOUS

[13, 14] The trial court found as another aggravating factor that the offense had been committed in an especially cruel and heinous manner pursuant to A.R.S. § 13–703(F)(6) which provides: "The defendant committed the offense in an especially heinous, cruel or depraved manner." Appellant contends this was error.

"Cruel" has been defined as "disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic." *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). Cruelty involves the victim's pain or suffering before death. *State v. Gretzler, supra; State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982); *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979). The offense must be committed in an *especially* cruel, heinous or depraved manner to be considered an aggravating circumstance. *State v. Lujan, supra*. We do not find the offense to be especially cruel; there is no evidence in the record to indicate the victim suffered more pain than that of the initial blow which rendered him unconscious.

[15, 16] "Heinous" has been defined as "hatefully or shockingly evil; grossly bad," and "depraved" is "marked by debasement, corruption, perversion or deterioration." *State v. Knapp, supra*. Heinous and depraved involve the mental state and attitude of the offender as reflected in his words and actions. *State v. Gretzler, supra; State v. Poland, supra; State v. Lujan, supra*. In *Gretzler, supra*, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim. Here the victim was already unconscious and bleeding when he was run over not once, but twice, each time from a different direction. The evidence indicates that the first run by the vehicle was over the victim's head crushing his skull and killing him. The second run of the vehicle was over the body of the victim. The investigating officers found, at the location of the murder, two large pools of blood separated by about 30 feet, which was consistent with the body having been run over and dragged to where it was found. Again the fact that the victim in the instant case was run over twice and his skull was crushed, we find to be a ghastly mutilation of the victim.

The presence of any one of the three elements—cruel, heinous, or depraved—is sufficient to constitute an aggravating circumstance. *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980). We believe the facts of this case set it "apart from the normal first degree murders." *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). The trial court was correct in finding the offense was committed in an especially heinous manner. It is also evident that the trial court could have found that the offense was committed in an especially depraved manner.

Appellant argues in the alternative that the "cruel, heinous and depraved" language of Arizona's death penalty statute is unconstitutionally vague and broad. We have addressed this contention in *State v. Gretz-*

ler, supra, and found no constitutional infirmity in the statute.

The trial court judge did not find that "the defendant committed the offense as a consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13–703(F)(5). The trial court judge was under the mistaken belief that this subsection only applied to the "contract" type murder. Appellant was sentenced on March 13, 1980. This was prior to our decision in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), where we specifically held that this aggravating circumstance is not limited to the "hired gun" or "contract" type killing. In *Clark* we stated that this subsection applies to any murder committed for financial gain.

The state addressed this issue in its answering brief, but did not raise the issue through a cross-appeal. Thus, we need not reach the issue of the propriety of this court finding an additional aggravating circumstance which was not found by the trial court.

MITIGATING CIRCUMSTANCES

[17] At the 1980 sentencing hearing appellant presented evidence of his conduct in prison since 1974 when he first went to death row. Testimony was received from members of appellant's family, his friends, and from prison counselors which related appellant's good character, the change in attitude he has undergone and his attempts to better himself. Appellant contends the trial court erred in failing to find his improved conduct and character to be a mitigating circumstance. Appellant cites *State v. Watson (II)*, 129 Ariz. 60, 628 P.2d 943 (1981), where very similar evidence was presented as mitigation. There we held that the evidence could and should be considered a mitigating circumstance. While it would have been an arbitrary decision had the court refused to consider the evidence, it is clear from the record the court *did* consider the evidence but found it unpersuasive.

INDEPENDENT REVIEW

[18, 19] The sentencing statute, A.R.S. § 13–703, provides that the death penalty shall be imposed if the court finds one or more aggravating circumstances and "there are no mitigating circumstances sufficiently substantial to call for leniency." In death penalty cases, this court will conduct an independent examination of the record to determine for ourselves the presence or absence of aggravating and mitigating circumstances and the weight to give each. We also independently determine the propriety of the sentence. *State v. Gretzler, supra, State v. Blazak, supra.* The trial court correctly found three aggravating circumstances: first, that the defendant has been convicted of an offense (murder) for which life imprisonment or death was imposable, A.R.S. § 13–703(F)(1); second, that the defendant has been convicted of a felony (murder and kidnapping) involving the use or threat of violence, A.R.S. § 13–703(F)(2); third, that the offense was committed in an especially heinous manner, A.R.S. § 13–703(F)(6).

As mitigating factors the court found that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged, that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense and had solicited an act of prostitution with Faith Erwin, a minor, near the time of the offense. The court also found that the jury was instructed on the felony murder rule as well as on matters related to premeditated murder. Additionally, the court found appellant's family was supportive of him and would suffer considerable grief as a result of the imposition of the death penalty.

[20] The trial court did consider evidence regarding appellant's change in character, but was unable to make a definitive finding on the matter. In *State v. Watson* (II), *supra*, we held that evidence revealing a substantial improvement of a defendant's character could be viewed as a mitigating factor. In the case at bench the trial court was not convinced that appellant's character had changed. We do not believe this position was unreasonable. The trial court was able to observe appellant at the resentencing hearing and listen to his testimony. The trial court was also aware appellant had been in a very controlled environment while his alleged change of character took place, with much to gain from his good behavior. Additionally the judge had evidence before him of the lifestyle appellant led before his incarceration, including the fact he was involved in another murder. These facts cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor. The court further found that there were no mitigating circumstances sufficiently substantial to call for leniency.

We believe the mitigation offered by appellant is not sufficiently substantial to outweigh the aggravating circumstances. Particularly we note the fact that this is not the first murder which appellant has perpetrated, as well as the gruesome manner in which this murder was committed. The death sentence is appropriate in this case.

Appellant likens his case to *State v. Watson* (II), 129 Ariz. 60, 628 P.2d 943 (1981), where we set aside the death sentence. Both cases involve a robbery and subsequent murder. Both defendants presented as mitigation evidence of a significant change in their character for the better, and both defendants received harsher sentences than their accomplices. However, the aggravating circumstances are very different in that the offense in *Watson* was not found to be especially heinous and depraved. Moreover, the defendant in *Watson* had only one prior conviction for robbery, while appellant in the instant case has prior convictions for both kidnapping and murder in separate incidents. Additionally, in *Watson* there were other compelling factors in mitigation—the age of the defendant (21) and the fact that the victim was armed and fired the first shot. We believe the differences in the cases are so significant that the different resolutions are necessary.

PROPORTIONALITY REVIEW

[22] We stated in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), that we will conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.*, 114 Ariz. at 196, 560 P.2d at 51. We have considered other cases in which the defendants robbed and murdered their victims and received the death penalty. *State v. Gretzler, supra; State v. Clark, supra; State v. Jordan, supra; State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Evans*, 120 Ariz. 158, 584 P.2d 1149 (1978), *sentence aff'd*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980). We find that the resolution in the instant case is not disproportionate to these cases.

CONSTITUTIONAL CHALLENGES

[23] Appellant challenges the constitutionality of the Arizona death penalty statute claiming the statute, on its face and in application, is violative of the eighth amendment in that it allows for arbitrary and capricious determinations. We have previously considered and rejected this issue. *State v. Gretzler, supra; State v. Blazak, supra; State v. Richmond, supra.*

[24] The death penalty was challenged by appellant in a Rule 32 petition for post-conviction relief on the ground that in Arizona this penalty has been imposed in a manner discriminatory against black persons. This post-conviction relief was denied and we granted his petition for review which we consolidated with this appeal. In addition, appellant claims he was denied due process of law when the court refused to hold a hearing on this claim. In a similar argument appellant claims the death penalty has been visited upon poor persons and male persons in disproportionate numbers. We agree with the state's assertion that neither the federal constitution nor this

court has ever required that the imposition of the death penalty precisely reflect the composition of the general population. What the United States Supreme Court has required is guidelines to bridle the discretion of the sentencing authority, thus minimizing the risk of arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[24, 25] Before one is subject to the death penalty in Arizona, the state must charge him and prove him guilty beyond a reasonable doubt. Then the state must prove aggravating circumstance(s) beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (1980). The trial court may then find mitigating factors substantial enough to call for leniency. This court will then conduct an independent review of all matters of aggravation and mitigation to determine if the death sentence was properly imposed. *State v. Gretzler, supra; State v. Richmond, supra.* In addition, we conduct a proportionality review in every case to assure the penalty is not excessive nor disproportionate to the sentences imposed in similar cases. *State v. Gretzler, supra; State v. Richmond, supra.* These safeguards are blind to the color, wealth or sex of the defendant. We find no merit in appellant's argument.

We do not find it necessary to address appellant's last contention that the death penalty is a violation of international law.

We have examined the entire record for fundamental error, as required by A.R.S. § 13–4035, and find none.

The sentence of death is affirmed.

HAYS, J., concurs.

CAMERON, Justice, specially concurring.

[26] I agree that the death penalty is properly imposed in this case. However, because I disagree with the majority in its holding that the crime was especially heinous and depraved, I feel that I must specially concur.

I do so not because I am insensitive to the tragic consequences of defendant's criminal conduct, but because I believe that if the death penalty statute in Arizona is to pass constitutional muster, it must be interpreted in such a way that only those who clearly come within the mandate of our legislature and the United States Supreme Court are given this punishment. The death penalty is reserved only for those crimes which are above the norm of first degree murders, or for defendants who are above the norm of first degree murderers. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27–28 (1983); *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981).

The majority finds this crime to be especially heinous and depraved under A.R.S. § 13–703(F)(6), based on two of the criteria set out in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria.

The infliction of gratuitous violence was found and the death penalty imposed in *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), in which the defendant continued to shoot his victims after it was apparent they had been fatally wounded, and then began kicking one of the victims in the face repeatedly while the victim was already unconscious or dead. We said,

> We think that defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, is such an additional circumstance of a * * * depraved nature so as to set it apart from the 'usual or the norm.' 126 Ariz. at 40, 612 P.2d at 496, quoting *State v. Ceja*, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977). *See also State v. Gretzler*, supra, 135 Ariz. at 52, 659 P.2d at 11.

We similarly held that gratuitous violence was inflicted in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), where after the killing the defendant climbed on top of the

corpse and beat its face repeatedly with his fists, resulting in facial wounds and bleeding. In *State v. Woratzeck*, 134 Ariz. 452, 657 P.2d 865 (1982), we also held that gratuitous violence was employed where the defendant strangled, stabbed and bludgeoned the victim to death, and the force used by each of these three methods was sufficient to kill. The death penalty was properly imposed in both *Jeffers* and *Woratzeck*.

In the instant case the victim was killed by being run over by an automobile. The evidence adduced at trial indicates the automobile was likely backed over the victim, and then driven forward over the victim. There is no evidence to suggest that the defendant knew or should have known that the victim was dead after the first pass of the car. *Cf. State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982) (victim still alive after defendant ran over him with his automobile several times). Therefore, unlike the defendants in *Ceja*, *Jeffers*, and *Woratzeck*, supra, there has been no showing that this defendant inflicted any violence on the victim which he must have known was "beyond the point necessary to kill."

The criterion of mutilation of the victim was demonstrated by *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981), where the defendant strangled to death his prison cellmate and then carved the word "Bonzai" into the victim's back. Similarly in *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981), after suffocating the female victims the defendant proceeded to mutilate their sex organs and breasts with sharp objects. The death penalty was imposed in these two cases based in part on the finding that the crime was committed in a heinous and depraved manner. The facts of these cases are in marked contrast to the present case. Here there is no suggestion of distinct acts, apart from the killing, specifically performed to mutilate the victim's body. Any disfigurement of the victim in this case was the direct result of the killing itself. I do not believe we should stretch the definition of "mutilation" to cover all murders in which the victim's body is disfigured, where there is no indication of a separate purpose to mutilate the corpse.

It is true, of course, that the appearance of the victim in this case was "ghastly" as the majority states. But as the United States Supreme Court has recently said in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing an application of Georgia's statutory aggravating circumstance of "outrageously or wantonly vile, horrible or inhuman"),

> [I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational. Id. at 433, n. 16, 100 S.Ct. at 1767, n. 16, 64 L.Ed.2d at 409, n. 16 (plurality opinion). *See also* id. at 435, 100 S.Ct. at 1768, 64 L.Ed.2d at 410–11 (Marshall, Brennan, J.J., concurring) ("[We] also agree that * * * the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant.")

Our statutory aggravating circumstance of a heinous or depraved killing focuses on the state of mind of the killer, *see State v. Graham*, 135 Ariz. 209, at 212, 660 P.2d 460 at 463; *State v. Jeffers*, supra, 135 Ariz. at 429–430, 661 P.2d at 1130–31; *State v. Zaragoza*, supra, 135 Ariz. at 68–69, 659 P.2d at 28–29; *State v. Gretzler*, supra, 135 Ariz. at 51, 659 P.2d at 10; *State v. Wortzeck*, supra, 134 Ariz. at 457, 657 P.2d at 870, not on the appearance of the corpse. Although the resulting scene was gruesome, I believe the proper application of the criteria discussed above fails to support a finding that the killer acted in a state of mind which was especially heinous or depraved. This crime is therefore not above the norm of first degree murders.

The criminal record of this defendant, however, clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent

crime justifies the imposition of the death penalty.

I concur in the opinion of the majority except its finding that this crime was heinous and depraved, and I concur in the result.

GORDON, Vice Chief Justice, concurring.

I concur in Justice Cameron's special concurrence.

FELDMAN, Justice, dissenting.

I cannot agree with that portion of the majority decision which holds that the death penalty may now be properly imposed upon the defendant.

I agree with Justice Cameron that the murder was not heinous and depraved. The remaining aggravating circumstances in this case were that defendant had been convicted of an offense for which life imprisonment or death was imposable, A.R.S. § 13–703(F)(1), and that defendant had been convicted of a felony involving the use or threat of violence, *id.* (F)(2). Both of these circumstances pertain to the character of the defendant, defining the type of murderer and serving to set the defendant apart and above the "norm" of killers. As we stated in *State v. Watson (Watson II)*, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981):

> [T]he death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, *or the background of the defendant sets him apart from the usual murderer.*

(Emphasis supplied.) As Justice Cameron correctly states, the crime here does not stand out "above the norm of first degree murders"; thus, the imposition of the death penalty in this case is clearly based upon the character of the defendant.

In *Watson II, supra*, we held that rehabilitation evidence could and should be considered a mitigating circumstance. *Id.* at 63–64, 628 P.2d at 946–47. Thus, *Watson II* stands for the proposition that the relevant question in such cases is not limited to defendant's character at the time of the offense, but also includes his character at the time the death penalty is to be carried out.

The majority opinion indicates that the evidence of defendant's improved conduct and character was "very similar" to that presented in *Watson II*, yet concludes that the mitigation evidence offered by defendant was not sufficiently substantial to call for leniency. While defendant's prior murder conviction weighs heavily against him, in my view the rehabilitation evidence "very similar" to that presented in *Watson II* tips the balance strongly in favor of reducing defendant's sentence to life imprisonment.

At the final sentence hearing, twelve individuals offered evidence of defendant's changed character and efforts to rehabilitate himself since his imprisonment in 1974. These witnesses included several members of his family, employees of the Arizona State Prison at Florence, a fellow prisoner on death row, and a local missionary who regularly visited and corresponded with the defendant. The theme which ran through all of the testimony at the sentence hearing was that defendant had changed remarkably since he had arrived at prison six years previously. The witnesses believed that defendant's attitude had improved materially, that he had found a purpose in life and now had a genuine desire to better himself and, more important, to help others. There seemed to be no question but that this desire to help others was more than subjective; it was actually carried into effect.

There were objective facts to support these opinions. Among the objective factors which manifested the change in defendant were the following: Defendant had transformed himself into a literate person, learning to read and write. He had learned to type. Witnesses testified that defendant often read three books a week and exchanged reading materials with other prisoners. Defendant had employed his newfound ability to read, write and type by using his time in prison in a constructive manner, typing numerous letters to family and friends, and studying the Bible. The

counselors employed at the prison testified that defendant provided encouragement, advice and spiritual assistance both to his family and to other prisoners.

Defendant's family noted the difference in his attitude. Defendant had become settled and matured. He was honestly trying to give some meaning to his life. From prison, both in the form of letters and visits from his family, defendant assisted them with their problems, gave them advice and encouraged them. He was truly concerned for his family's welfare. The same was true for his relationship with other prisoners.

The counselors employed by the prison also testified that defendant's attempts to better and rehabilitate himself were genuine. Of course, this is a matter of opinion, but it was uncontradicted and, in light of the experience of the prison counselors, I would place great weight on their assessment.

Finally, the defendant himself testified that if given life imprisonment he understood that he would never live outside prison, because the life sentence would and should be imposed consecutively to the other sentences which he was already serving. Nevertheless, he felt that he had changed and had something worthwhile to offer others in prison society and his family if he were allowed to live. Given the current problems of our prison system, it is certainly necessary that we provide inmates with role models and assistance for rehabilitation, especially when such models are based upon changes in attitude and religious commitment.[1] The record available to us thus leads to an overwhelming conclusion that defendant has made a sincere, successful and continued effort to change his character, rehabilitate himself and contribute in his own way to society. As the majority indicates, the trial court could not make a "definitive finding" on the question of rehabilitation. While the majority speculates that the trial court was "not convinced" that defendant's character had changed, the fact is that the trial court made no such finding. The majority states that the facts "cast sufficient doubt upon appellant's veracity so the trial court could reasonably decline to find the proffered evidence to be a mitigating factor." Again, the trial court made no such statement. In any event, the rehabilitation issue does not turn primarily upon defendant's testimony at all. There were twelve other witnesses, unimpeached and unrebutted on the issue, and the proof of change, rehabilitation and contribution to society stands uncontested in this case. Nor is this change some desperate, last-minute attempt by defendant to avoid the death penalty. The testimony indicated that the change in defendant's attitude and character manifested itself long before 1981 when *Watson II* first established that such a change was relevant in deciding whether to impose death.

Thus, the majority's conclusion on independent review that the trial court could have found defendant's changed character was not genuine, and therefore "could reasonably decline to find the proffered evidence to be a mitigating factor" is incorrect for two reasons. First, the trial court made no such finding. Second, there are no facts to support such a finding, even if it had been made. The State advances no such facts in this court, though it does not admit the change in character is genuine. Of

1. The conclusion that because of his change in character the defendant would serve as a useful role model for other prisoners is more than mere speculation. The May, 1983 issue of *La Roca*, a magazine published by and for prisoners at the Arizona State Prison, contains an article on defendant written by Charles Doss, a prisoner who serves as editor of the magazine. In an article commencing at page 19, entitled "Death Row Revisited," Mr. Doss writes of defendant's attitude and actions when he first came to death row ten years earlier and the remarkable change which has taken place with the passage of years. The article illustrates that both inside and outside the walls of the state prison a man's life and behavior may set an example which serves as a standard for others. The article is not part of the record, but the statute provides that mitigating evidence may be considered regardless of admissibility under the rules of evidence and may consist of "any factors" relevant to defendant's character. A.R.S. § 13–703(C) and (G).

course, it is the State's obligation to examine any purported change in character with a deservedly cynical eye. I, too, agree that it would be better if felons found God before committing their crimes rather than before being punished. It is the court's obligation, however, to recognize the possibility and principle of redemption and rehabilitation.

Further, independent review on the death penalty issue involves more than a determination of whether the trial court's imposition of this penalty can be supported by the record. It requires our own, independent conclusion from the record. *Watson II*, 129 Ariz. at 63, 628 P.2d at 946. While the aggravating circumstances which were found to exist may indicate that the defendant was above the norm of murderers, the evidence of changed character is persuasive mitigation. Review of this record indicates strong evidence of rehabilitation and the probability that if allowed to live, defendant will make a contribution of some value to society. Then what is to be gained by imposing death under these circumstances? Except in the physical sense, the defendant whom we today consign to the gas chamber is not the same person who committed the crime in 1973 and was first sentenced to death in 1974. While the passage of time should not be the test, we must acknowledge that in the ten years which it has taken to reach this point, the defendant has been given time to change. Perhaps those ten years should not have been allowed to pass, but we must remember that the statutes under which the defendant was previously sentenced to death were declared unconstitutional, *State v. Watson* (*Watson I*), 120 Ariz. 441, 586 P.2d 1253 (1978), and, as a result, defendant has been given time which he has put to good use. While quick punishment may deter, punishment of this defendant at this time serves only to illustrate that redemption and rehabilitation have no practical purpose.

Speedy imposition of the ultimate penalty might also have served the societal interest in retribution. *See Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976). But, again, the imposition of death upon a defendant who has changed so remarkably serves no valid purpose as far as retribution is concerned, because we now visit society's retribution upon a different person. Nor is society protected by imposition of the death penalty since reduction to life imprisonment would ensure that this defendant would not become eligible for parole during his lifetime. By putting this defendant to death in the face of his efforts to change and the reasonable prospect that if allowed to live he will be of value to society, we accomplish nothing but revenge. To some, especially those in the heat of anger, this may seem a sufficient reason to kill. The law should not be swayed by such emotions; it does not and cannot kill in anger; it rejects the concept of an eye for an eye and a tooth for a tooth.

The totality of the evidence offered in mitigation establishes sufficient grounds for this court to reduce defendant's sentence to life imprisonment without possibility of parole for 25 years, to be served consecutively to all other sentences. Accordingly, I dissent from the portion of the opinion which, on independent review, affirms the imposition of the death sentence.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

FILED
June 30 1980
CHARLES N. CORBETT, Clerk
[signature] Deputy

THE STATE OF ARIZONA, Plaintiff, vs. WILLIE LEE RICHMOND, Defendant.	)	No. A-24252

Tucson, Arizona

March 13, 1980

Thursday,

BEFORE: The Hon. Richard N. Roylston, Judge
Division No. VII

APPEARANCES:

James Howard, Esq., Deputy County Attorney, appearing in behalf of the State

Allen Minker, Esq., Ass't. Public Defender, appearing in behalf of the Defendant

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PIMA COUNTY FOR RECORDER

RE-SENTENCING

Volume 3

Mary Bernal
Court Reporter

and just result will occur in the future.

The future of Case A-24252 is no longer in 1973 or 1974. It is 1980 now, and I submit again that the sentence in this case should be life imprisonment.

THE COURT: Do you have anything further, Mr. Howard?

MR. HOWARD: Nothing further.

THE COURT: At this time, we will proceed with the sentencing.

Other than the matters raised by your previous motions, Mr. Minker, is there any other legal reason why sentencing, at this time, should not be pronounced?

MR. MINKER: No, Your Honor.

THE COURT: Is there anything further you wish to advise the Court?

THE DEFENDANT: No, Your Honor.

THE COURT: I believe this was sent back for resentencing only as to Count 1 of the charge and pursuant to Section 13-454 Subsection C.

The Court returns the following special verdict as to the findings of existence or nonexistence of circumstances set forth in Subsection E and F.

As to Subsection E, that is the aggravating circumstances to be considered; as to Count 1: the Court finds that the defendant has been convicted of another

offense in the United States, for which under Arizona law a sentence of life imprisonment was imposable, that being Case No. A-24176 in the Superior Court of Pima County, State of Arizona.

As to that finding, the Court further finds that if this case is not properly includable under this section, it is properly includable under Subsection 2.

Now, as to Subsection 2, the Court finds that the defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, that being Case No. A-17969, in the Superior Court of Pima County, State of Arizona.

As to Items 3 and 4, the Court finds nonexistence of those items. That should be as to Items 3, 4 and 5.

As to Item 6, the Court finds that the defendant did commit the offense in this case in an especially heinous and cruel manner.

As to Subsection F, mitigating circumstances; as to Item 1: The Court finds the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was not significantly impaired.

As to Item 2, the Court finds that the defendant was not under unusual or substantial duress.

As to Items 3 and 4, the Court finds nonexistence

of those items.

Now, the law has since added an Item 5 in that statute. It wasn't in there at the time of the original sentencing. However, Item 5 is the defendant's age. The Court will make a finding on that also. That was also one of the requested findings by the defense.

The Court finds that the defendant was age 25 years at the time of the offense and finds that the age in this case is not a mitigating factor.

Now, the defense having raised certain specific items for the Court's consideration as mitigating factors and having requested that the Court make findings as to those mitigating factors, the Court will do so.

As to Item 1, the Court finds that Rebecca Corella was involved in the offense but was never charged with any crime.

As to Item 2, the Court finds that Faith Irwin was involved in the offense but was never charged with any crime.

As to Item 3, the Court finds that the victim had engaged in an illegal act of prostitution with Rebecca Corella near the time of the offense; and, the Court also finds that the victim had solicited an illegal act of prostitution with Faith Irwin, a minor, near the time of the offense.

As to Item 4, the Court finds that the jury was instructed both on matters relating to the felony murder rule, as well as matters relating to premeditated murder.

As to Item 5, that was the one raised by the defense regarding age, and the finding has already been made by the Court on that.

As to Item 6, the defense claims that the character of the defendant has changed substantially for the better since the time of the conviction of the offense, and to this item, the Court is unable to make a definitive finding.

As to Item 7, the Court finds that the defendant's family is supportive of the defendant and will suffer considerable grief as the result of any death penalty which might be imposed.

MR. MINKER: Excuse me, Your Honor. May I interrupt?

THE COURT: Yes.

MR. MINKER: Your Honor found the existence of the facts concerning Rebecca Corella and Faith Irwin, plus the next two facts submitted to the Court, but the Court did not state whether the Court would or would not consider these to be mitigating circumstances. I would ask the Court to so state whether the Court considers

them to be mitigating circumstances or not.

THE COURT: And the Court has considered all of the items raised by the defense on the question of mitigating circumstances.

The Court further finds that considering both the enumerated circumstances in the statutes and the enumerated circumstances raised by the defense, and having considered them separately and as a whole, the Court finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

The jury having heretofore returned a verdict of guilty to first degree murder and the Court having heretofore entered a judgment of guilt as to that charge on February 27, 1974; it is the judgment of the Court that the defendant be sentenced to death.

It is further ordered that the clerk file the notice of appeal as provided for by the Rules of Criminal Procedure pursuant to Section 26-15.

It is further ordered that the defendant shall remain in the custody of the sheriff and to be returned to the Arizona State Prison.

Any further findings today?

MR. MINKER: Perhaps before Willie is taken away today, might he be able to visit with his family before he leaves today?

THE COURT: And the Court requests that the sheriff allow visitation between the defendant and his family. Now, that is just a request. That is not an order. It is a request.

MR. MINKER: I have been asked by Willie that the Court would order telephone calls.

THE COURT: Yes. How many do you want? How many are you requesting, Mr. Minker?

MR. MINKER: I'm sorry. Did you ask how many telephone calls?

THE COURT: Yes.

MR. MINKER: Three.

THE COURT: And apparently, this form of Notice of Appeal, Mr. Minker, you have to sign it and then I am directing the clerk to file it.

MR. MINKER: You wish me to sign it?

THE COURT: I think that would be appropriate.

MR. MINKER: May I take this, at this time, Your Honor? May I discuss it with the clerk a little later?

THE COURT: The only reason I am making that order is that it looks like the rule says that I am supposed to make that type of order, at this time. If you want some type of delay, I would certainly consider it.

MR. MINKER: Well, since it is automatic, I have a designation that I wish to make with it. I would prefer to use my own Notice of Appeal.

THE COURT: The record may show that the form which will be filed by the clerk under the Court's direction may be taken by Mr. Minker and filed at the same time that he files his own drafted form.

Is there anything further, at this time?

MR. MINKER: No, Your Honor.

THE COURT: The court stands at recess.

(Whereupon, the hearing was concluded at 3:50 p.m.)

APPENDIX E

IN THE SUPERIOR COURT OF

THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

JUN 24 4 23 PM 1974

BY J. Hucko DEPUTY

STATE OF ARIZONA,

Plaintiff,

vs.

WILLIE LEE RICHMOND,

Defendant.

No. A-24252

Mitigation Hearing

February 25, 1974

State of Arizona

County of Pima

(1)

why sentence should not be pronounced?

MR. BOLDING: None that I can think of at this time, Your Honor.

THE COURT: Is there anything further that you would wish to advise the Court prior to sentencing?

MR. BOLDING: Nothing further, Your Honor.

THE COURT: Mr. Richmond, I have read your letter that you sent to me. Is there anything further that you want to tell me at this time that you think I should know?

THE DEFENDANT: No, not right now.

THE COURT: Well, as to count two of the charge, the jury having found you guilty of the crime of robbery, it is the judgment of the court that you are guilty as charged. It is the further judgment of the court that you be sentenced to the Arizona State Penitentiary for a period of not less than fifteen nor more than twenty years.

Now, as to Count One, the record may show that pursuant to section 13-454 subsection "C" the Court returns the following special verdict as to the findings of the existence or non-existence of circumstances set forth in subsection "E" and "F" that the subsection "E" aggravating

circumstances to be considered as to item one, the court finds non-existence of that item.

Item two. The court finds the defendant was previously convicted of a felony in the United States and involving the use or threat of violence on another person. That being the case, #A-19769 in Pima County Superior Court as to items #, #4, and #5, the court finds the non-existence of those items.

As to item #6 the court finds the defendant did commit the offense in a specially henious and cruel manner.

Now, as to subsection "F", mitigating circumstances as to item one, the court finds the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired. As to item two the defendant was not under unusual or substantial duress. And as to items #3 and #4 the court finds the non-existence of those items.

The jury having returned a verdict of guilty to the crime of first degree murder, the judgment of the court is that you are guilty as charged. It is the further judgment of the court that you are sentenced to death.

It is ordered that the clerk shall file a notice of appeal as provided by the rules of civil procedure.

It is ordered that the defendant shall remain in the custody of the Sheriff for transportation to the Arizona State Penitentiary.

Now, there is an automatic appeal insofar as Count One is concerned. Insofar as Count Two is concerned I assume that that would be included in the same appeal, but in the event that there is some question, I advise the defendant at this time as to Count Two you have the right to appeal from all proceedings in this court. Notice of appeal must be filed within 20 days from this date. You have the right to have an attorney to represent you on appeal. If you can't afford an attorney, the court will appoint one to represent you. The court will provide you with the transcript of all proceedings at the expense of Pima County.

It is ordered that the Public Defender be appointed to represent the defendant on appeal to the Arizona Supreme Court.

Is there anything further at this time? If not the court will stand at recess.

No. 91-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director,
Arizona Department of Corrections; and
ROGER CRIST, Superintendent of the
Arizona State Prison,

Respondents.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies:

That on the 15 day of January, 1992, I mailed a copy of the Petition for a Writ of Certiorari in this case by United States Mail, postage prepaid, to:

Jack Roberts
Assistant Attorney General
Department of Law
1275 West Washington, 2nd Floor
Phoenix, Arizona 85007

Timothy K. Ford
Attorney for Petitioner